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THE BRITISH YEAR BOOK OF
INTERNATIONAL LAW



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CLARENCE WILFRED JENKS
1909–1973

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BRITISH YEAR BOOK OF INTERNATIONAL LAW
THE EDITORSHIP

ALL those connected with the Year Book, and not least the members of the Editorial Committee and its Chairman, will greatly regret the departure of Sir Humphrey Waldock from the editorship, which he has graced for so many years but felt he must give up for lack of time due to his duties at The Hague.

When he took over from the 1955-6 volume onwards, it was no easy matter to succeed an Editor of the calibre of Sir Hersch Lauterpacht, whose editorship had brought the Year Book up to a very high level of interest and expertise. This tradition has, however, been triumphantly maintained by Sir Humphrey over a period of nearly twenty years. This is, I believe, the longest single period of editorship in the history of the Year Book and all will be grateful to Sir Humphrey for the way in which he has exercised it.

Professor R. Y. Jennings now becomes senior Editor and is joined by Dr. Ian Brownlie who has edited the book reviews over the last six volumes; his period of joint editorship will begin with the next volume. The Year Book is to be congratulated on securing his services.

In this way the present tradition of a joint editorship, which used to be normal at one time (Hurst/Pearce Higgins/Whittuck: Hurst/Pearce Higgins: Fischer Williams/McNair: Pearce Higgins/Brierly) will be continued. Few could carry this burden alone for long in the way Sir Hersch Lauterpacht did, and Sir Humphrey also, in respect of his first four volumes.

G. G. FITZMAURICE

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CLARENCE WILFRED JENKS

I

1. DR. WILFRED JENKS, Director-General of the International Labour Organization and a member of the Editorial Committee of this Year Book, died on 9 October 1973. He was taken ill suddenly on 5 September, soon after the opening meeting of the special centenary session of the Institute of International Law, held in the Capitol in Rome, for which the Institute had done him the signal honour of making him its first Vice-President. His death nearly five weeks later, when hope of his recovery was growing, was a tragic loss not only to the I.L.O. but to the international community as a whole and to international law. Moreover his capacity for friendship was remarkable, and his death will be felt as a keen personal loss by his many friends, old and young, in many lands.

2. President of the Union Debating Society and winner of the Cecil Peace Prize at Cambridge, Jenks was inspired to make his career in international law by Arnold McNair. He always cherished his connection with Cambridge, to which he frequently returned; and it gave him great pleasure when he was elected an Honorary Fellow of his own College of Gonville and Caius. Entering the Legal Section of the I.L.O. at the age of 22, he became successively Legal Adviser, Assistant Director-General, Deputy Director-General, Principal Director-General and finally, in 1970, the Director-General of the Organization. He was indeed the first Principal Officer of a major international organization to have made his whole career within the organization. His primary achievements are naturally to be found in his life's work for the I.L.O., and of these achievements only someone in very close contact with the work of the Organization can have full knowledge. The Editors therefore asked Miss Morgenstern, a member of the staff for many years, to write the appreciation of Jenks's outstanding contribution to the International Labour Organization which follows this notice by the Editors of his no less remarkable contribution to the science of international law.

3. Deeply absorbed although he was in his official work and in the diplomatic activity which it entailed, Jenks managed to produce an almost continuous stream of books, articles and lectures of high quality which place him among the foremost writers on international law of his generation. In their delightful flat in the Rue Contamines, he and his wife, Jane, entertained nearly every international lawyer who came to Geneva, and he was thus in constant touch with recent developments and modern opinion in international law. His library, which grew to fill almost every

inch of his study from floor to ceiling, contained much besides international law, manifesting the deep interest in economics, in the developments of science and technology and in human welfare which characterized all his legal writing. The extraordinary width of his reading, the ease with which he absorbed the essentials of alien disciplines, his quickness of focus and his enviable facility of expression could alone render possible the massive contribution which he made to the literature of international law.

4. Three of Jenks's thirteen books deal specifically with international labour law, to which he had himself made so large a contribution. *The International Protection of Trade Union Freedom* (1957) was a pioneering study of 'the development of international action for the protection of freedom of association for trade union purposes'. Running to some 570 pages, it contained a comprehensive account of the work of the International Labour organization in this field, including a particularly valuable insight into its reporting, fact-finding and conciliation procedures as international guarantees of trade union rights. In *Human Rights and International Labour Standards* (1960), a monograph based on lectures delivered in the United States, he gave an illuminating account of the practices and procedures of the I.L.O. in the protection of trade union freedoms, and explained how they might serve as valuable guides in tackling the international protection of other human rights and freedoms. He returned to this theme in *Social Justice in the Law of Nations* (1970)¹ in which, after an impressive review of the contribution made by the I.L.O. to the development of social justice in industrial relations during the first fifty years of its existence, he suggested that the I.L.O.'s experience and achievement made it a significant 'prototype' for developing social justice in other fields.

5. Jenks's interest in international organization, however, was more general; and amongst his earliest publications were articles on 'Some Problems of an International Civil Service' (1943)² and on 'Some Legal Aspects of the Financing of International Institutions' (1943),³ together with a monograph on the *Headquarters of International Institutions* (1945) designed to draw attention to the principles and practical considerations which he believed should determine the location and status of international institutions of a universal character. Later, he planned a trilogy of three volumes on the general law of international organizations which would 'attempt to combine an examination of the practical legal problems confronting international organizations in the day-by-day discharge of their everyday responsibilities with an appraisal of the significance of contem-

¹ Based upon his 'Hersch Lauterpacht' Lectures delivered in the University of Cambridge in 1969.

² *Public Administration Review*, 3 (1943), No. 2, p. 103.

³ *Transactions of the Grotius Society*, 28 (1943), p. 122.

porary developments for the general structure and theory of the law'. Of these three volumes only two, *International Immunities* (1961) and *The Proper Law of International Organizations* (1962) had been published before his death. Reviewing *International Immunities* in this *Year Book*,¹ another distinguished international official wrote of Jenks: 'His prodigious efforts have greatly enriched the study of international organizations and have opened up new terrain that would otherwise have remained in the obscurity of internal archives.' The book, he said, was 'a concise compendium of the international agreements and judicial decisions in this field leavened by perceptive observations based on practical experience and a sense of growth and direction of international authority'. *The Proper Law of International Organizations*² was another pioneering work, being the first comprehensive study of the implications in international and municipal law of the attribution of legal personality to international organizations. Dealing successively with the choice of law problem, with the international administrative law governing the internal legal relations of organizations and with their legal transactions with third parties, this book constituted a veritable first text-book on the 'personal law' of international organizations. The third volume of the trilogy, which Jenks had yet to complete, was to be entitled 'Corporate Personality for International Purposes'; and in it he intended³ to explore generally 'the manner in which the increasingly complex pattern of international life has resulted in the development during the last three-quarters of a century of an ever-increasing variety of forms of associative action on an international scale'. The growing importance of such international bodies, he considered, has 'far-reaching implications for the fundamental transformation through which the law is evolving from a law the subjects of which "are States solely and exclusively" towards the "common law of mankind" '.

6. In *The Common Law of Mankind* (1958), Jenks brought together in a book of over 440 pages a number of articles and lectures the subjects of which he had selected as 'illustrations of changes in the political, economic and scientific fields which are of major significance for the contemporary development of the law'. The book, he explained, was an attempt to explore the impact of the revolutionary changes in the political, economic and scientific background of contemporary international law that the Second World War and its aftermath had precipitated. Its basis, he said, was 'the general conception that contemporary international law can no longer be reasonably presented within the framework of the classical exposition of international law as the law governing the relations between States but

¹ 39 (1963), p. 507, Oscar Schachter.

² See the review by D. W. Bowett in this *Year Book*, 38 (1962), pp. 513-14.

³ See Jenks's introduction to *The Proper Law of International Organizations*, pp. xxxii-xxxiii.

must be regarded as the common law of mankind in an early stage of its development'. *The Common Law of Mankind* proved to be only the first of a series of five books in which Jenks sought to express his ideas concerning the transformations required in international law if it was to meet the needs of our rapidly evolving world and serve as the common law of a single world community; the other four being *Law, Freedom and Welfare* (1963), *Law in the World Community* (1967), *The World Beyond the Charter* (1968) and *A New World of Law* (1969). Like the earlier book, these also were composed from lectures delivered and articles published in different parts of the world. The lectures and articles, however, were deeper in content than most occasional papers and, despite the variety of their subjects, they were given a unity and cohesion by the underlying themes of the needs of the new world community and international law's potentialities as the common law of mankind. Moreover, in *A New World of Law*, which grew out of his 'Storr Lectures on Jurisprudence' delivered at Yale Law School, Jenks took the opportunity of bringing together and arranging systematically the many suggestive ideas which he had formulated in his earlier books. Addressing himself in this book with almost missionary fervour to international lawyers, he stressed again and again the need for them to bring a progressive frame of mind and creative imagination to the solution of the legal problems facing the world today. In it he used to full advantage the fruits of his extensive reading among the works not only of international lawyers but of legal philosophers, reviewing each problem and suggesting persuasively the path to its solution.

7. Jenks, as the Institute of International Law's rapporteur for the subject of space law, was largely instrumental in securing the adoption in 1963 of its timely 'Resolution on the Legal Regime of Outer Space', showing in the process all the skill and diplomacy which marked his work for the I.L.O. The results of his research for the Institute he afterwards expanded into a full-length book, *Space Law* (1965), in which he set out virtually all the then existing legal material of possible relevance to the legal problems that might be thrown up by activities in outer space. Most impressive of all his books, however, was perhaps *The Prospects of International Adjudication* (1964), in which he examined virtually every aspect and deficiency of international adjudication and every possible means for its development and improvement.¹ As an indication of the character of the contribution made by Jenks in this book to the science of international law, it suffices to recall some of the things that were said of it by one of the Editors when reviewing it in this *Year Book*:²

¹ The Chapter on compulsory jurisdiction in this book grew out of his work as rapporteur on this subject for the Institute of International Law.

² Professor R. Y. Jennings, 40 (1964), pp. 407-13.

Hitherto, in the many writings which have already put international lawyers very greatly in his debt, Dr. Jenks has been concerned principally with the newer branches of the subject. Here he tackles that hardest of tasks: a classical theme already extensively and seemingly exhaustively worked by the best writers of all periods. Yet, by a rare combination of massive scholarship, rigorous analysis, fertile imagination, and unflagging enthusiasm, Dr. Jenks not only illumines but adds a new dimension to this theme.

It is a great strength of Dr. Jenks's writings that, though always forward-looking, and moved by a transcendent faith and dedication, yet his ideas have their origins so clearly in the main stream of existing law. He offers no panaceas; nor does he indulge in ineffectual calls for a 'new' international law. Here in this book the reader may find set out in great detail possible lines of development so bold in their conception that many, or even most, may not be realisable in our time; yet each one, for all its freshness, conforms to the strictest orthodoxy in the sense that it is demonstrated to be a logical progression from existing, orthodox law.

And in the final paragraph of the review Professor Jennings summed up his own opinion of the book as follows:

This is a fine work on a grand scale dealing with a crucial aspect of international law. 'Throughout the discussion', says Dr. Jenks, 'I have attempted to conceive of international adjudication as an adjunct to, and not a substitute for, international organisation, economic policy and diplomacy' (p. xiv). There is a further point. Progress in means for international adjudication is not only desirable for the settlement of disputes according to law; it is also essential for the proper development of the law itself. For it is often forgotten that some aspects of law—e.g. rules concerning nullity and validity—cannot be adequately developed at all in the absence of courts with compulsory jurisdiction. The best contribution the lawyer can make at the present juncture towards the attainment of this great end is, in Dr. Jenks's own words, to establish and set out 'a strategy of progress'; and this he has done indeed most admirably in this major work of massive yet meticulous scholarship, deployed with a great vigour of style and thought, and above all with that zeal and a sense of mission that marks all the greatest works on international law, and which Dr. Jenks has in abundance.

8. Add to all the books already mentioned the four series of lectures which Jenks gave at the Hague Academy of International Law¹ and his numerous articles in learned journals and in 'Festschrifts', and the sheer size of his contribution to the literature of international law becomes even more astonishing. Moreover, even amongst his more occasional writings, there were some quite formidable both in scope and in depth of legal scholarship, notably his magisterial articles in this *Year Book*. Two of these were profound and particularly sensitive appraisals of the contributions of Hersch Lauterpacht and John Fischer-Williams to international law;²

¹ *Les instruments internationaux à caractère collectif* (1939); *Co-ordination—a New Problem of International Organization* (1950); *The International Protection of Freedom of Association for Trade Union Purposes* (1955); and *Liability for Ultra-Hazardous Activities in International Law* (1966).

² 36 (1960), pp. 1–103 and 40, (1964) pp. 233–85. These articles, it is believed, were intended by Jenks to be the forerunners of yet another book which would review the British Contribution to international law.

and it was symptomatic of Jenks's own approach to the subject that he should entitle these articles respectively 'Hersch Lauterpacht—The Scholar as Prophet' and 'Fischer-Williams—The Practitioner as Reformer'. Indeed, in the final paragraph of his article on Lauterpacht he seems almost to have been stating his own credo as well as describing that of Lauterpacht:

He believed that human society has outgrown its political framework; that scientific and technological advances have created a world in which moral standards and political institutions have failed to keep pace with ever more complex and urgent needs; that the resulting crisis jeopardises fundamental ethical values and all that we should treasure most highly in our cultural heritage, and may jeopardise the future of the human race itself; that living through one of the grand climacterics of history the international lawyer, while unable as such to affect decisively the course of events, nevertheless can and must assume a full measure of responsibility for promoting and guiding the development of a legal order rooted in freedom, founded on justice, and dedicated to the maintenance of peace. . . . He approached every task which fell to his lot with a sense of mission compounded by a sense of overriding urgency. He was never satisfied to rest content with determining how the accepted law stood; he consistently recognised an obligation to the future and attempted to make the law a vehicle of moral and political wisdom and progress. . . .

Certainly, it would be difficult to find any words more apt to describe the philosophy and beliefs which inspired Jenks's own life and career as an international lawyer. Nor can there be any doubt that, by his writings and by his massive contribution to the I.L.O., Jenks has made his own place secure alongside Lauterpacht and Fischer-Williams, both as 'Prophet' and as 'Reformer'.

HUMPHREY WALDOCK
R. Y. JENNINGS

II

Wilfred Jenks in the I.L.O.

As a young man, in 1931, Wilfred Jenks joined a public service which had been given, by its first Director, Albert Thomas, a clear conception of its role and its responsibilities. According to that conception, it was the responsibility of staff to play an active part in the achievement of the objectives of the organization; and it was their duty, as appropriate, to take the initiative in proposing action, to seek a synthesis of different approaches, and to 'temporize in deadlocks'. Jenks lived by that conception of public service. And his stature, both within the Office and in relation to the representative organs of the Organization, was such that for more than thirty years, during which he held, successively, the positions of Legal Adviser, Assistant Director-General, Deputy Director-General, Principal

Deputy Director-General and, finally, Director-General, he was associated with every major policy decision taken in the Organization in areas of concern to international law.

His published writings were intimately associated with his work in the Organization; the unity of thought in one and the other helps to explain why he was able to publish so much while always giving more than a day's work to the Organization. Sometimes the writing inspired the practical result; in his early years in the Organization particularly, his clear-sighted analysis of problems¹ preceded the opportunity for action—opportunity which the times he lived in were to provide in ample measure. Sometimes the writing was the fruit of actual developments.² Through his writing, as sometimes through more direct means, his influence on the development of international organization extended far beyond the I.L.O.

The qualities he expected of an international civil servant were high: the integrity, conviction, courage, imagination, drive and technical grasp 'required for the successful discharge of any important public duties in a modern society', as well as a distinctively international outlook, high personal standing and linguistic qualifications.³ He had them all. He had, above all, a lofty and far-ranging vision of the role of international organization in the promotion of 'the common welfare of mankind' which inspired his approach to concrete problems, and the unshakable faith that, whatever the vicissitudes, that vision would be realized.

The Constitution of the I.L.O. In a Memorandum on the future development of the Constitution and constitutional practice of the I.L.O. submitted in January 1945 to the Committee on Constitutional Questions of the Governing Body,⁴ Jenks, as Legal Adviser, emphasized that the Constitution was sufficiently flexible to allow of great scope for growth, and that a dynamic approach to constitutional problems was the established tradition of the Organization. At the same time, it was, in his view, imperative that any change in the Constitution be made only after the case for such change had been established 'to the general satisfaction'. The International Labour Conference, in 1946, endorsed, as considerations of long-range constitutional policy to which it attached the highest importance, the two principles that the Constitution must have a flexibility which 'allows of growth and of adaptation to the needs and opportunities of an unknown future' and that there must be general agreement on its fundamental provisions which will 'maintain unimpaired the unity and

¹ See, for instance, 'Some Legal Aspects of the Financing of International Institutions', *Transactions of the Grotius Society* (1942), pp. 87-132; 'Some Problems of an International Civil Service', *Public Administration Review* (1943), pp. 93-105, etc.

² See, for instance, *The International Protection of Trade Union Freedom* (1957); 'State Succession in Respect of Law-Making Treaties', this *Year Book*, 29 (1952), pp. 105-44.

³ 'Some Problems of an International Civil Service', loc. cit. (above, n. 1 on this page).

⁴ International Labour Office, *Official Bulletin*, XXVII (1945), no. 2, pp. 114-45.

strength of the Organization'.¹ 'These principles', Jenks was to say, as Director-General, in his address to the 1971 Session of the Conference, when dealing with the questions of the structure of the Organization which had constituted an important item on its agenda, 'remain the heart of our constitutional experience and wisdom. Guided by them we can, I am persuaded, progressively resolve all of the outstanding issues.'²

Jenks was deeply committed to the universality of international organizations in general and the I.L.O. in particular, with a full awareness of the stresses which this involved. He was instrumental in the adoption, in 1945, of the provision of the I.L.O. Constitution according to which any Member of the United Nations can become a Member of the I.L.O. on acceptance of the obligations of the I.L.O. Constitution, as an 'expression of the aspiration of the organization towards universality'.³ In the statement he made to the Governing Body in May 1970, upon election as Director-General, he included in his fundamental beliefs that 'The I.L.O. is, and must always remain, a universal organization. It belongs to all mankind and serves impartially the whole human race.'⁴ Two implications of universality were to be of much practical concern to him in his career. First, there was the question of the propriety of permitting continued membership in the Organisation by a State which violated the principles of the Constitution of the Organization; this question was particularly acute in the early 1960s with respect to South Africa and its policy of *apartheid*.⁵ His position was at all times unequivocal:

The universality and permanence of the world community preclude recourse to expulsion as an effective sanction for violation of its standards; such problems must be solved within its membership by insistence on the obligations of membership, not by measures of expulsion or exclusion the practical effect of which is to release the offender from those obligations. The world community is not a club of the mutually congenial but an experiment in the organised government of all mankind.⁶

Secondly, there was the question of the effective participation, and collaboration within the Organization, of States with widely differing social and economic structures. From his earliest days in the Organization⁷ to

¹ International Labour Conference, *Record of Proceedings*, 29th Session, 1946, p. 352.

² *Ibid.*, 57th Session, 1971, pp. 714-15. On dynamism in the Constitution of the I.L.O., with specific examples, see also *A New World of Law?* (1969), pp. 227-9.

³ International Labour Conference, Report IV (1), 27th Session, 1945, pp. 82-9.

⁴ Minutes of the 179th (Special) Session of the Governing Body, May 1970, p. 17.

⁵ South Africa chose early in 1964 to withdraw from the Organization. In June of that year the Conference adopted a constitutional amendment which would permit the Conference to expel a Member which had been expelled by the United Nations; the amendment has not yet entered into force.

⁶ *Universality and Ideology in the I.L.O.* (Geneva, Graduate Institute of International Studies, 1969), p. 7 and earlier references there cited.

⁷ As from 1934 he addressed himself to what was to be for many years the most troublesome aspect of the question, namely the representation in the Organization of socialized

the days of his Director-Generalship he applied himself to making such participation and collaboration a reality. His approach was twofold: on the one hand, he sought to circumscribe political controversy, which was liable to disrupt the work of the Organization without making any significant contribution to the solution of the questions in controversy; on the other, he sought to identify and focus attention on common interests and common purposes.¹ In a world which remains divided, he could not expect full success in his lifetime; he did achieve substantial consensus on means and substantial progress on ends.

Jenks believed in the tripartite structure of the International Labour Organization; it was to him significant for the evolution of international law from 'a law between States only and exclusively' towards the 'common law of mankind'.² The structure, of course, preceded him; his contribution was to watch over its effective operation and, as the activities of the Organization extended, its adaptation to new forms of action. One example of the former is provided by the steps taken to mitigate the effect of Section 17 of the Convention on the Privileges and Immunities of the Specialized Agencies, which, in making the immunities of the representatives of Members inapplicable in relation to the authorities of the State they represent or of which they are nationals, did not 'appear to make sufficient allowance for the special situation of employers' and workers' representatives to meetings of the International Labour Organization'; these steps culminated in the adoption by the International Labour Conference of a resolution recording the understanding of the Conference, as part of the body of constitutional practice of the Organization,

. . . that it is a necessary implication of the tripartite structure of the Organization that delegates to the Conference representing employers and workers and Employer and Worker members of the Governing Body should be able to express freely their views on matters of concern to the Organization and . . . that . . . the right of such delegates and members to express their point of view freely includes the right to inform of their speeches the members of their organizations in their countries.³

One example of the latter was his concern to ensure greater association of employers and workers with technical co-operation activities:

Would it not be possible for the Minister of Labour or Social Affairs in each country in which there is a substantial I.L.O. technical co-operation programme to take

management. See 'The Origins of the International Labour Organization', *International Labour Review*, 30 (1934), No. 5, p. 580.

¹ A fuller exposition of his concept is given in *Universality and Ideology in the I.L.O.* (above, p. xviii n. 6. See also, e.g., International Labour Conference, Report IX, 'General Review of the Reports of the Working Party on the Programme and Structure of the I.L.O.', 53rd Session, 1969, pp. 177-80.

² See, e.g., 'The Significance for International Law of the Tripartite Character of the I.L.O.', *Transactions of the Grotius Society*, 22 (1936).

³ International Labour Conference, *Record of Proceedings*, 54th Session, 1970, pp. 61, 186, 240.

personally the initiative in convening employers' and workers' representatives to discuss the position, problems and prospects of the programme informally . . . with himself and any other ministers concerned . . . and with I.L.O. representatives . . . ? Such a practice . . . would, in respect of I.L.O. projects, bring the over-all plan into much closer and more fruitful contact with those whose lives are being planned . . .¹

It was perhaps also the tripartite structure which led him so early to consider that some form of consensus was the most appropriate basis for making decisions in international organization. Writing in 1965,² he was able to say that the principle of consensus 'has been for a generation the normal method of working of the Governing Body of the International Labour Office . . . its normal method of doing business is to evolve by a discussion a consensus of opinion which is summed up by the Chairman and recorded as a decision not in the form of a resolution but in the terms in which the Chairman sums up the discussion'. In the International Labour Conference, two important constitutional practices, in the evolution of which Jenks played an important part, may be referred to.³ It has become the practice in recent years for the Conference, at the beginning of each session, to outline means for 'more continuous negotiation in committees between the several groups'; and the Conference has long regarded it as its role, in plenary session, to seek some accommodation in cases in which a particular provision of a proposed Convention or Recommendation so divided the competent Conference Committee that serious doubts existed as to the ultimate usefulness of the instrument. Moreover, Jenks felt able to describe the procedures evolved in a tripartite organization to provide a balance between voting power and power to pay in the adoption of the budget, as 'something approaching a consensus budget'.⁴

On the financing of international organizations in general, Jenks in 1942 read a paper to the Grotius Society which provided a programme of action for a generation and more.⁵ 'International institutions should enjoy a legal personality . . . qualifying them to hold funds in their own right'; by the 1946 amendment to the Constitution the I.L.O. was endowed with such personality; as were, at that time, other organizations.⁶ 'Sums contributed

¹ I.L.O. Third African Regional Conference, *Record of Proceedings*, 1969, p. 167; Reply of the Secretary-General to the Discussion of the Report of the Director-General. At the time of his death the Governing Body of the I.L.O. had before it proposals for tripartite evaluation machinery on technical co-operation projects.

² 'Unanimity, The Veto, Special and Simple Majorities and Consensus as Modes of Decision in International Organization', *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (1965).

³ On the philosophy of these practices see International Labour Conference, Report I: Report of the Director-General on the Programme and Structure of the I.L.O., 47th Session, 1963, pp. 135-8. Standing orders were to Jenks important as the framework of obtaining agreement. See *A New World of Law?* (above, p. xviii n. 2), p. 245.

⁴ Ibid., p. 258.

⁵ 'Some Legal Aspects of the Financing of International Institutions', *Transactions of the Grotius Society*, 28 (1943), pp. 87-132.

⁶ Not all the formulae used were to his satisfaction. See 'The Legal Personality of International Organizations', this *Year Book*, 22 (1945), pp. 267-75.

to the funds of international institutions should become their absolute property'; if this is still far from true, at least part of the I.L.O.'s Working Capital Fund is, under the Financial Regulations, the property of the Organization as such.¹ 'It should be clearly established . . . that contributions to international budgets . . . are in the fullest sense a legal obligation'; as regards the so-called regular budgets this was, indeed, established in the constitutional work following the war, and by later interpretations, but as regards the funds for technical co-operation work, their essentially voluntary character remained a matter of great concern to him.² 'Interest at a rate to be specified by an appropriate international authority should be payable on all late payments of contributions'; nearly 30 years later, as Director-General of the I.L.O., he was to submit for the consideration of the Governing Body papers on financial incentives for prompt payment and/or penalties for late payment; at the same time, from 1946 provision was made in the Constitution of the I.L.O. and of other organizations for the loss of voting rights of States whose arrears equalled two years of contributions, and the I.L.O. has, perhaps, been the only organization in which that provision has been consistently applied.

Finally, with respect to the status of international organizations, all Jenks's emphasis was on the immunities necessary to ensure the exercise of their functions in full independence. Three examples, perhaps not widely known, serve to illustrate his approach. First, the Agreement between the Swiss Federal Council and the I.L.O. of 1946, in the negotiation of which he was instrumental, contains clear provisions on the entry into, sojourn in and departure from Swiss territory of all persons having official business with the I.L.O.; under the General Conventions on the Privileges and Immunities of the United Nations and the Specialized Agencies, drafted at the same time, the matter has had to be dealt with largely by interpretation. Secondly, for a great many years, and until a recent standardization of practice at the instance of the host State, virtually the entire staff of the I.L.O. in Switzerland enjoyed immunity from jurisdiction,³ but unlike the situation in many other organizations, fewer than ten officials enjoyed customs privileges. Thirdly, following some pressures for greater privileges and facilities for technical co-operation staff, and inter-organization consideration of this proposal in 1967, there was an exchange of letters at the highest level between the International Labour Office and the United Nations Development Programme, in which it was stressed

¹ The only other major organization in which this is so appears to be W.H.O.

² See, for instance *Britain and the I.L.O.* (David Davies Memorial Lecture, 1969), p. 19.

³ Total immunity from jurisdiction seemed necessary to him as a guarantee of independence from national control; this did not mean that immunity was not consistently waived in all cases in which the interests of the service were not affected.

that the right of organizations to rely on immunities vital to their work must not be prejudiced by excessive claims to privilege, and that an emphasis on privileges and facilities was liable to create a wrong image of the staff engaged in development activities: 'our objective is to serve the developing countries . . .; we must at all costs avoid any appearance of creating a new colonial caste'.

The Aims and Purposes of the I.L.O. It is an open secret that Jenks was co-author of the Declaration concerning the aims and purposes of the I.L.O. which was adopted by the Conference at Philadelphia in 1944 and embodied in the Constitution of the I.L.O. by the Instrument of Amendment of 1946. The Declaration, he emphasized, was not a statement of rights but a constitutional mandate for continuing action by the Organization;¹ and to the manner of carrying out that mandate he had a very practical approach: it was 'to tackle in succession a series of well-defined problems of limited scope'.² So freedom slowly broadens out.

This is not the place to analyse the Declaration. To two of its guiding principles, however, Jenks attached overriding importance.

The first was the interdependence of human rights and social policy expressed in the affirmation that 'all human beings, irrespective of race, creed or sex have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity'.³ That affirmation was the starting-point of practical international concern with human rights. Within the I.L.O. it was followed by far-reaching action, for which Jenks at all times had primary responsibility, concerning the human rights falling most directly within the competence of the Organization: freedom of association; freedom from forced labour; protection against discrimination in employment and occupation. The action included, but was far from limited to, the adoption of a series of key Conventions, each of which now has over 80 ratifications, and the operation of constitutional and other procedures to ensure the effective application of the standards so defined.⁴ It was not, to Jenks, enough: in particular, he was concerned at the interdependence of the human rights in question, and civil liberties not yet internationally protected to the same degree: this concern was expressed, in particular, in the report on trade union rights and their relation to civil liberties submitted to the International Labour Conference in

¹ 'Human Rights, Social Justice and Peace', 7 *Nobel Symposium* (1967).

² *Human Rights and International Labour Standards* (1960), p. 138.

³ Speaking before the U.N. Commission on Human Rights on 22 March 1971, Jenks was to say 'this principle (the writing of which, if I may say so, with a deep humility, Mr. President, I look back to as the most worth-while thing of my lifetime in the I.L.O.) remains our sheet anchor'.

⁴ On this action see, in particular, *The International Protection of Trade Union Freedom* (above, p. xvii n. 2); and *Human Rights and International Labour Standards* (in n. 2 on this page).

1970¹ and led to the adoption, by the Conference, of a resolution *inter alia* initiating 'further action to ensure full and universal respect for trade union rights in their broadest sense'.

The second was the interdependence of social policy and policies of an economic and financial character and the primacy of the social objective. The Declaration of Philadelphia affirmed that economic and financial policies were acceptable only in so far as they might be held to promote and not to hinder the achievement of social justice; it was a source of great satisfaction to Jenks that the International Development Strategy for the Second United Nations Development Decade, unanimously approved by the General Assembly some 25 years later, made this approach world policy. The I.L.O.'s main contribution to this synthesis of the economic and the social has been in the field of employment. In the Declaration of Philadelphia the International Labour Conference recognized the solemn obligation of the Organization to further programmes which would achieve full employment. In 1957 Jenks, reviewing the—mainly legislative—action thus far taken in pursuance of that obligation, and the comparable provisions of the Charter of the United Nations and the constituent instruments of the major economic organizations, concluded that there was 'a constitutional responsibility of the international organizations concerned to co-operate in seeking to make those obligations effective'.² Under his Director-Generalship this conclusion was given practical effect by the first major steps in the World Employment Programme, launched by the I.L.O. in 1969, in the form of multi-disciplinary missions, representing more than a dozen international organizations, to advise the governments of countries inviting them, on the design and contents of development strategy aimed at full employment and adapted to their special needs and problems.

The Methods of Action of the I.L.O. Jenks had some experience of all the means of action of the I.L.O. Thus it pleased him to be able to say that he had been, in the 1930s, one of the I.L.O.'s first technical assistance experts. More important, his memorandum, as Legal Adviser, on the constitutional capacity of the I.L.O. to undertake operational tasks³ set forth the legal basis for the development of technical co-operation activities. But his name will always be associated with two forms of action: the adoption of international labour standards in the form of Conventions

¹ Report VII, 54th Session, 1970. One of Jenks's first acts as Director-General was to open the proceedings of the Conference Committee dealing with this item; he there launched the idea of procedures under which collective bodies would have standing to protect individual rights, later developed in his address to the centenary meeting of the International Law Association, on 31 August 1973. International Labour Conference, *Record of Proceedings*, 54th Session, 1970, pp. 578–9.

² 'Employment Policy in International Law', *Acta Scandinavica Juris Gentium*, vol. 27.

³ International Labour Office, *Official Bulletin*, XXXI (1948), No. 3, pp. 287–92.

and Recommendations; and the operation of the constitutional and other procedures to ensure the effectiveness of the standards so set.

Throughout his career, Jenks saw every proposed Convention and Recommendation, and saw it at every stage of the drafting process. This meant that the 'Codex of Social Justice' acquired a unity of thought, of expression and of presentation which has no parallel in international instruments. It also meant that his creative imagination was applied to all the problems raised in their elaboration. The most important example of this is the great variety of 'flexibility' devices included in international labour Conventions in the endeavour to establish standards of relevance to countries with widely different levels of development, while maintaining firm the principle that ratifications could not be made subject to reservations¹ and that it was for the tripartite International Labour Conference alone to determine the minimum acceptable level of international obligation. The two editions of 'The International Labour Code', for both of which Jenks was responsible, were the first attempt to present international standards as an integrated statute book. Jenks also dealt with a large variety of ancillary issues in a manner which enriched both the internal law of the Organization and, perhaps, international treaty laws in general. His memorandum, as Legal Adviser, on the reasons why Article 19 (5) of the Constitution of the I.L.O.—which requires Members to bring Conventions and Recommendations adopted by the Conference before 'the authority or authorities within whose competence the matter lies'—requires submission to the legislature,² stated a principle which, in his own words, 'has been of decisive importance in the effectiveness of the legislative procedure of the I.L.O.'³ His concern, in the 1950s, that changes in the international status of States and territories should not prejudice standards accepted and applied in pursuance of international labour conventions,⁴ which concern was echoed by the first African Regional Conference of the I.L.O. in 1960,⁵ led to the establishment within the I.L.O. of a constant practice that obligations under such Conventions are recognized to survive State succession.

The development and operation of the constitutional and other procedures to ensure the effective application of international labour standards have been amply described by Jenks himself.⁶ For many years he repre-

¹ The practice of the I.L.O. in respect of reservations was authoritatively stated in the memorandum to the International Court of Justice in the *Genocide Case*. *I.C.J. Pleadings*, 1951, pp. 216-82.

² International Labour Office, *Official Bulletin*, XXVI (1944), No. 2, pp. 206-21.

³ *Law, Freedom and Welfare* (1963), p. 117.

⁴ 'State Succession in Respect of Law-Making Treaties', this *Year Book*, 29 (1952), pp. 105-44.

⁵ *Record of Proceedings*, p. 277.

⁶ See, in particular, *The International Protection of Trade Union Freedom* (above, p. xvii n. 2) and 'Human Rights, Social Justice and Peace', loc. cit. (above, p. xxii n. 1).

sented the Office on all the bodies concerned, which have always paid tribute to his legal and diplomatic role.¹ One feature of all these procedures was of key importance to him: that decisions should be arrived at in a spirit of independence and objectivity, removed from political considerations. So the Committee of Experts on the Application of Conventions and Recommendations, which is composed of members appointed in their personal capacity by the Governing Body on the nomination of the Director-General,² regularly included leading lawyers and statesmen, who have formally gone on record to the effect

. . . that they must endeavour to accomplish their task in complete independence as regards all member States. Thus impartiality and objectivity are the fundamental rules of conduct which the Committee has set itself in performing its work . . .³.

The Commissions of Inquiry set up under the complaints procedure (Article 26 of the Constitution of the I.L.O.) have been composed of persons having held the highest judicial or public office, appointed in their personal capacity, similarly on the nomination of the Director-General; on taking up their duties these persons have made a solemn declaration based on the oath of judges of the International Court of Justice and they have formally recognized, in their reports, the judicial nature of their task.⁴ The position concerning the Fact-Finding and Conciliation Commission on Freedom of Association has been analogous.⁵ Moreover an interesting light is thrown on the tradition of objectivity which has been so established, by the procedures relating to representations (Article 24 of the Constitution of the I.L.O.) and of the Governing Body Committee on Freedom of Association. The competent bodies under these procedures are not composed of persons acting in an individual capacity; they are composed of members of the Governing Body, i.e. of a representative organ. Yet the rules under which they operate⁶ and the manner in which they approach their task has made it possible, without exaggeration, to describe the procedures as quasi-judicial.

The I.L.O. and other Organizations. Jenks was intimately associated with the establishment of the whole system of relations between the organizations of the United Nations family, in the period which saw the creation

¹ On the role which may be played by high officials as intermediaries between judicial bodies and the parties, see 'The International Protection of Trade Union Rights', *The International Protection of Human Rights* (ed. by Evan Luard, 1967), p. 243.

² On the importance attached by Jenks to this prerogative of nomination, see *ibid.*, p. 240.

³ International Labour Conference, Report III (Part IV), 40th Session, 1957, p. 3.

⁴ See, e.g., International Labour Office, *Official Bulletin*, XLV (1962), No. 2, Supplement II, p. 227 and XLVI (1963), No. 2, Supplement II, pp. 7, 15.

⁵ See, e.g., *ibid.* XLIX (1966) No. 1, Special Supplement, pp. 12-13.

⁶ For instance, the rule that no representative or national of the State against which an allegation is made nor any person holding an official position in the Organization making the allegation may participate in the proceedings.

of the system.¹ He attended many of the constitutional Conferences which led to the creation of the various organizations as a representative of the I.L.O. or, as in the case of F.A.O., as an expert on constitutional questions.² He remained responsible in the I.L.O. for relations with other organizations, and was active in the Preparatory Committee of the Administrative Committee on Co-ordination, or in the Administrative Committee itself, from their inception until his death. By virtue of his knowledge, experience and consistency of approach, he had a definite influence on the shaping of relations between organizations.

His approach, perhaps with somewhat differing emphases at varying times, rested on three basic principles: the retention by the I.L.O. of the authority essential for the discharge of its responsibilities under the Constitution; the unqualified recognition of the responsibility of the United Nations for the solution of certain political problems; and the co-ordination of the activities of the various organizations for the achievement of a common purpose.

The autonomy of the specialized agencies in general and the I.L.O. in particular was to him justified by a number of major policy considerations.³ There was the consideration, born of the experience of relations with the League of Nations, that no international organization was as yet beyond risk, political or financial, and that 'the more bonds of world unity, the more opportunities of dynamic action we can insulate from these dangers by insulating them from each other, the greater will be the vitality, strength and long-term viability of the whole system'. There was the consideration that the specialized agencies were the focus of international co-operation between national authorities responsible for action in their respective spheres: 'Unity of action at the international level must be achieved, as at the national level, not by ignoring the considered views of those who have the knowledge, authority and responsibility for action at the national and international level in a specialized field, but by giving these views their rightful place in a wider framework.' As regards specifically the I.L.O. there was the consideration that the freedom and equality of participation of employers' and workers' representatives, 'which are the basis of the confidence in it of those whom it exists to serve', must not be impaired.

¹ On the history, see, in particular, International Labour Conference, Report IV (1), 27th Session, 1945, and Report II (2), 29th Session, 1946.

² See para. 5 of the first report to governments by the Interim Commission on Food and Agriculture, where tribute is paid to Jenks's work on the F.A.O. constitution: it can be consulted in Cmnd. 6590 (misc. No. 4, 1945).

³ See, on this, in particular, 'The I.L.O. in the United Nations Family', an Address at the U.N. Institute for Training and Research, 23 January 1969. See also 'Co-ordination: A New Problem of International Organization', *Recueil des cours*, 77 (1950-II), and 'Co-ordination in International Organization', this *Year Book*, 28 (1951).

At the same time, 'the I.L.O. should never substitute its political judgment for that of the United Nations in matters which are primarily a United States responsibility, not because its judgment would necessarily be worse or less responsible than that of the United Nations . . . but because it cannot make such a judgment effective where it counts, and conflicting political judgments and decisions by different members of the United Nations family are liable to frustrate each other by creating inextricable confusion'.¹ The clearest example of that approach was related to the recognition of governments. The Credentials Committee of the International Labour Conference, when faced with claims from rival authorities to represent a member State, has always concluded that in so controversial a political question the United Nations and the specialized agencies should adopt a uniform attitude, the lead being taken by the United Nations, and accordingly that it could not recommend independent action. Conversely, the decision of the General Assembly of the United Nations in 1971 to recognize the Government of the People's Republic of China as the representative Government of China was immediately followed by a parallel decision of the Governing Body of the International Labour Office. Reference may also be made to two amendments to the I.L.O. Constitution adopted in 1964; they make provision for a power to expel or suspend Members, but only on the basis of a previous political decision by the United Nations.

The co-ordination of the activities of the various organizations was, in Jenks's view, passing from an initial, relatively negative, function of avoiding duplication or overlap to one of 'vigorous partnership in common action'.² Not that all problems of possible conflict have yet been resolved; for instance, while Jenks in 1953 already envisaged the problems inherent in the concurrent legislative activities of a variety of organisations,³ ways of avoiding conflict in their legislative work were accepted by the organizations of the United Nations family only in 1973. Conversely, however, examples of joint action by two or more organizations, international and regional have multiplied over the years; in the legislative field alone one can mention the Rome Convention on Performers' Rights, elaborated jointly by I.L.O., U.N.E.S.C.O. and the Berne Union, the Recommendation on the Status of Teachers, elaborated jointly by U.N.E.S.C.O. and the I.L.O., the European Social Charter, fruit of collaboration between the Council of Europe and the I.L.O., and a number of I.L.O. instruments with the elaboration and application of which other organizations have been closely associated. It was Jenks's belief that a pattern of joint action had come into

¹ *Universality and Ideology in the I.L.O.* (above, p. xviii n. 6).

² 'The I.L.O. in the United Nations Family' (above p. xxvi n. 3)

³ 'The Conflict of Law-Making Treaties', this *Year Book*, 30 (1953).

being, that the United Nations Development Programme and the World Employment Programme were practical examples of the pooling of the different capacities of all the organizations, and that the full potentialities of the system of co-ordination constituted by the Economic and Social Council and the Administrative Committee on Co-ordination could be realized in a not too distant future. And such was his vision of the future that he could speak of the resident representatives of the United Nations Development Programme, serving all organizations, as the embryo of the diplomatic service of the United Nations family.

The International Public Service. It was Jenks's view that legal work relating to the 'housekeeping' of international organization was, 'once a few major principles have been firmly established, of secondary or negligible importance for the development of international law and international organization'.¹ On questions of this kind he influenced policy;² he did not concern himself with the day-to-day problems.

One field must, however, be singled out: the international public service. The effectiveness of international institutions was to him necessarily dependent on the quality of their staffs and on their official status. It was essential to guarantee the distinctively international character of the duties and responsibilities of such staffs; he was the first to propose formally that the obligation of officials on the subject should be paralleled by an obligation of governments,³ and the double obligation was indeed in 1946 included in the Constitution of the I.L.O. as it was included in the Charter of the United Nations.⁴ It was necessary to have a hard core of permanent international civil servants; the I.L.O. has consistently attached more importance to an international career staff than many other organizations. He early saw the need to interrupt service at headquarters by spells of field work;⁵ during his Director-Generalship he gave great impetus to a policy of decentralization likely to give many officials experience of conditions in different parts of the world. He early envisaged, for safeguarding appointments from political pressures, an appointment authority which should have the power to formulate standards of qualifications;⁶ as Director-General he warmly supported proposals for a Civil Service Commission submitted to the General Assembly in 1973. He saw advantage in a unified

¹ 'Craftsmanship in International Law', *American Journal of International Law*, 50 (1956), p. 50; reprinted in *The Common Law of Mankind* (1958).

² See, for instance, 'Copyright in respect of the Publications and Other Documents of Official International Bodies', *University of Toronto Law Journal*, 5 (1943), and the provisions concerning international organizations included in Protocol No. 2 to the Universal Copyright Convention. See also *The Proper Law of International Organizations* (1962).

³ 'Some Problems of an International Civil Service', loc. cit. (above, p. xvii n. 1), p. 98.

⁴ It was a matter of gratification to Jenks that the framers of the Charter had adopted his views, which he had repeated in a memorandum 'Some Comments on the Dumbarton Oaks Proposals' circulated at the San Francisco Conference.

⁵ 'Some Problems of an International Civil Service' (above, p. xvii n. 1), p. 102. ⁶ Ibid., p. 99.

international civil service, with as much interchangeability between organizations as specialized functions permitted; he was certainly instrumental in the conception of the provision, in the Agreement between the United Nations and the I.L.O. and analogous agreements, that the organizations 'recognise that the eventual development of a single unified international civil service is desirable from the standpoint of effective administrative co-ordination' (Article 41), which was the beginning of the so-called 'common system' of personnel standards, methods and arrangements. He hoped, in 1943, that there might be one single 'World Administrative Tribunal' and in 1946 the International Labour Conference expressly made the transfer of the League of Nations Tribunal to the I.L.O. subject to the proviso that this should not be understood as prejudicing the possibility of the establishment at some future date of a single Administrative Tribunal for the United Nations and the specialized agencies; that has not come about, but the Administrative Tribunal of the I.L.O. is now used by fourteen organizations, which is at least a big step in the right direction.

Writing in 1943, Jenks expressed the view that 'the unusual combination of qualifications required by an international civil service can best be served by recruiting members of the service from young men and women who will make it their life work'.¹ At the end of the Second World War he surrounded himself with, and personally schooled, a number of young officials; the I.L.O. is not the only organization to have benefited from the intellectual leavening he provided. Nearly thirty years later, as Director-General, he again made it one of his main concerns to ensure that suitable young talent was entering the Organization; many of those concerned were unaware of the personal interest he took in their potentialities and development. It is through them that his legacy must live on.

* * *

For all his manifold activities in the I.L.O., Jenks was first and foremost a man of the law. In all he did, his aim was to make the rule of law effective in the world community. In the manner in which he approached problems, his concern for due process of law was paramount. On more than one occasion he risked, and faced, political opprobrium because of his insistence that the rule of law and due process of law brooked no compromise.

Jenks saw the work of a lawyer in an international organization as one of opportunity and responsibility. The opportunity was, 'if they learn to combine vision and inventiveness with tact and judgment and acquire the practical wisdom which distinguishes instinctively between a time for

¹ Ibid., p. 100.

boldness and a time for patience, to make a major contribution to the constructive development of the law at vital points'.¹ The responsibility was to develop a craftsmanship which could grasp such opportunities fully, and to own unswerving allegiance to the law in process of development. 'The responsibility is one which only "the tranquil and steady dedication of a lifetime" can fulfil.'² His was such dedication.

FELICE MORGENSTERN

¹ 'Craftsmanship in International Law', loc. cit. (above, p. xxviii n. 1), p. 51.

² Ibid., p. 60.

ADJUDICATION AND ADJUSTMENT— INTERNATIONAL JUDICIAL DECISION AND THE SETTLEMENT OF TERRITORIAL AND BOUNDARY DISPUTES*

By A. L. W. MUNKMAN

I. INTRODUCTION

THE *St. Croix River* case,¹ decided by a mixed commission appointed under the Jay Treaty (1794), is usually described as the first modern example of international adjudication. The Agent for the United States in those proceedings remarked of the decision, in a letter to the United States Secretary of State,

... you will be surprised to hear that it was rather effected by negotiation than by a Judicial determination.²

Moore, commenting on this observation, wrote:

It certainly is true that the decision did not fully allow the claim of either party; but it is permissible to take the view that what appeared to the advocate of one of the parties, and no doubt equally to the advocate of the other party, to be a 'negotiation' rather than a 'Judicial determination', since it required the abandonment by each of a part of his contentions, was after all only an example of the necessary process of adjustment, of the weighing of one consideration against another, by which, in the presence of proofs concerning the effect of which opinions may inevitably differ, concurrent and just human judgments, judicial and otherwise, are daily reached.³

More recent examples of this 'necessary process of adjustment' in operation are offered by the *Argentine–Chile Frontier*⁴ and *Rann of Kutch*

* The author of this article was killed in a road accident on 23 December 1972. She did not see the proofs and the proof reading has been done by the editors.

Miss A. L. W. Munkman was a member of Girton College in the University of Cambridge. She graduated Bachelor of Arts after reading in both classics and economics with no great enthusiasm. She then turned to law and there found intellectual satisfaction and thereafter devoted her very great abilities to international law. She was called to the bar by the Middle Temple, read the international law section of the Cambridge LL.B. and was placed in the first class. After a short period of research at Cambridge, she was appointed a Lecturer in the Department of Public International Law in the University of Edinburgh in 1969.

The accident which killed Athene Munkman at the age of only 32 deprived international law of one of the keenest intellects of her generation. A highly gifted scholar and teacher, devoted to international law, there is no doubt that, had she been spared, she would have made a major contribution of the first importance to the development and understanding of both public and private international law.—R. Y. J.

¹ Moore, *International Arbitrations*, vol. 1, p. 1; *International Adjudications*, Modern Series, vols. 1 and 2.

² *Ibid.*, vol. 2, p. 367.

³ *Ibid.*, pp. 367–8.

⁴ Published by Her Majesty's Stationery Office, 1966, and in *International Law Reports*, 38, p. 10. It is discussed below at p. 33.

arbitrations.¹ A glance at the diagram appended to the former award shows that the boundary line selected by the arbitrator does not follow the line claimed by either party, but, in effect, splits the disputed territory in half. The latter award also divides the territory in dispute: the major part was awarded to India; a smaller portion was awarded to Pakistan. Thus, superficially at least, awards ranging from the earliest to the most recent examples of modern international adjudication bear the marks of compromise.

Confronted with such 'compromise' awards, writers on the process of international adjudication have adopted three different standpoints.

(1) Some writers assert that 'compromise' is alien to the judicial function and characteristic only of 'diplomatic' procedures of dispute settlement—such as conciliation and mediation. These writers are therefore inclined to measure progress in the 'judicial' settlement of disputes by the elimination of 'compromise', and to regard adjudication by permanent courts as superior in that respect.²

(2) Other writers agree that 'compromise' should not be a part of the strictly 'judicial' settlement of disputes by a court, but regard it as a valuable characteristic of 'arbitration' which should be maintained. These writers therefore regard the procedure of 'arbitration' as midway between the procedures of mediation and conciliation and 'judicial settlement' by a permanent court, in that it offers a 'mediatory' or 'conciliatory', but binding, decision.³

(3) Still other writers assert that 'compromise' in some sense is a normal and essential element of the judicial function—whether exercised by an arbitrator or by a judge.⁴ They describe this element of 'compromise' in a variety of terms: as, for example, 'adjustment',⁵ the 'balancing of conflicting considerations',⁶ the finding of 'the exact balance' between opposing claims,⁷ or as the application of 'equity' to modify or supplement positive

¹ The *Introduction to the Award and the Conclusions of the Members of the Tribunal* are published by the Government of India Press (1968). The 'Introduction and Excerpts from the Conclusions' are also published in *International Legal Materials* (1968), pp. 633 et seq. The award is discussed below, p. 70.

² See, e.g., J. B. Scott, *An International Court of Justice*, pp. 64–5, and *The Status of the International Court of Justice*, pp. 21–6; Lapradelle and Politis, *Recueil des arbitrages internationaux* (introductions to successive volumes); also Hedges, 'The Juridical Basis of Arbitration', this *Year Book*, 7 (1926), pp. 110 et seq., and Moore, *International Adjudications*, vol. 1, especially at pp. lxxxv et seq. Cf. Dennis, 'Compromise, the Great Defect of Arbitration', *Columbia Law Review*, 11 (1911), p. 493.

³ See, e.g., Brierly, 'The Judicial Settlement of International Disputes' (reprinted in *The Basis of Obligation in International Law*, pp. 93 et seq.), at p. 95. Lachs makes a not dissimilar distinction (see below). See also the comments of the Netherlands Government on the International Law Commission's draft on arbitral procedure and the criticisms of the I.L.C. draft (see p. 6 n. 3 for references).

⁴ See, e.g., Moore, *International Adjudications*, at p. xc; Descamps (quoted *ibid.* at p. lxxxviii); H. Lauterpacht, *The Function of Law in the International Community*. See also Corbett on 'The Diplomacy of Arbitration' in *Law in Diplomacy*, pp. 136 et seq.

⁵ Moore, *International Adjudications*, vol. 2, p. 367.

⁶ Moore, *ibid.*, vol. 1, p. xc

⁷ Lauterpacht, *The Function of Law*, p. 121.

law.¹ Certain writers feel it necessary further to distinguish this 'judicial' compromise from 'non-judicial compromise'. Thus it has been asserted that

... a decision yielding a result which lies halfway between the claims advanced by the parties is not necessarily the consequence of a non-judicial compromise. As between individuals so also among States it is not unusual that legal claims and defences are on both sides stated in extreme terms. It is the function of the judicial process to find the exact balance.²

This assertion does not, however, clarify the distinction between 'judicial' and 'non-judicial' compromise. Such a distinction might, however, be based on either the procedure of settlement followed, or on the criteria adopted in reaching the compromise (or finding 'the exact balance'), or both.³

The existence of these different theoretical approaches to the place of 'compromise' in international adjudication raises practical problems in relation to the powers of international tribunals. It is generally accepted that an *excès de pouvoir* may render an award a nullity.⁴ Consequently, if compromise is alien to the judicial process it may constitute an *excès de pouvoir*, and a 'compromise' award or recommendation may be invalid. This assertion has indeed been made of several awards, either by one or both of the parties as a reason for not accepting it,⁵ or by writers criticizing an award which has, however, been accepted by the parties.⁶ Similarly, *excès de pouvoir* has been alleged of awards motivated, in whole or in part, by considerations asserted to be unauthorized by the *compromis* or irrelevant in international law.⁷ Some considerations, it is often said, may be

¹ Descamps (quoted in Moore op. cit. at p. lxxxviii).

² Lauterpacht, *The Function of Law*, p. 121.

³ See below, pp. 112-13, on the distinction between 'political' and 'legal' considerations. Cf. negotiations inside and outside the tribunal in the *St. Croix*, *Passamaquaddy* and *Venezuela-British Guiana Boundary* cases.

⁴ See, e.g., *Institut de Droit International*, resolution (1875), on arbitral procedure, Art. 27: 'La sentence arbitrale est nulle en cas ... d'excès de pouvoir ...'; I.L.C. model rules on arbitral procedure, Art. XXXV. Also Witenberg, *La Procédure et la sentence internationale*, pp. 367 et seq.; Lapradelle, 'L'Excès de pouvoir de l'arbitre', *Revue de droit international* (1928), pp. 5 et seq.; Verzijl, 'La Validité et la nullité des actes juridiques internationaux', *ibid.* (1935), p. 284; Castberg, 'L'Excès de pouvoir dans la justice internationale', *Recueil des cours*, vol. 35, pp. 357 et seq.; Guggenheim, *ibid.*, vol. 74 at pp. 216-19; Jennings, 'Nullity and Effectiveness in International Law', in *Cambridge Essays in International Law*, pp. 64 et seq. Examples of challenged awards are collected in Politis, *La Justice Internationale*; Carlston, *The Process of International Arbitration*; Cukwurah, *The Settlement of Boundary Disputes in International Law*, pp. 200 et seq.; and Nantwi, *The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law*, pp. 85 et seq. See also on the *Venezuela-British Guiana Boundary* award in particular, Schoenrich, *American Journal of International Law*, 43 (1949), p. 523; Child, *ibid.*, 44 (1950), p. 682; Dennis, *ibid.*, p. 720.

⁵ See examples in works listed above; also the *Arbitral Award of the King of Spain* case, I.C.J. Reports, 1960, p. 192—particularly the dissenting opinion of Judge Urrutia Holguín, pp. 221 et seq.

⁶ See above examples.

⁷ e.g. the *Honduras-Nicaragua* award, which was the subject matter of the *Arbitral Award* case.

properly taken account of by a mediator or conciliator, or a 'political' tribunal, but not by an arbitrator or judge.¹

The following exploration of the practice of international tribunals adjudicating boundary and territorial disputes and the practice of States in accepting or rejecting their awards, is intended to show how the powers of tribunals have been interpreted in practice in this particular sector of international adjudication. This examination of practice seems desirable for two reasons.

(1) There is a lack of agreement in theory on the scope of the powers of international tribunals. It is therefore necessary to examine more closely the practical distinctions—if any—between the powers of a judge, an arbitrator and a conciliator or mediator. Linked with this is the question whether there is any valid distinction, in practice, between a judicial and a non-judicial compromise.

(2) There has been little study of the criteria which actually motivate awards. Such a study is, however, useful in two respects. First, because it is often stated that certain considerations are, and others are not, relevant to decisions based on law. The validity of this statement must depend on what considerations are in practice taken account of by tribunals directed or presumed to apply 'law'. Second, the criteria applied by tribunals in making awards, if uniform, are part of the 'law' applied by international tribunals and therefore of interest in themselves, whether or not they are generally regarded as part of customary international law.

Before turning to an examination of the practice of international tribunals, however, it is as well to examine the theoretical context more closely. Although theoretical discussions of the international judicial process afford no unequivocal guidance as to the limits of the authority of judicial tribunals, there has been no lack of discussion of the question. This discussion at least identifies, if it does not resolve, certain problems. In part, at least, these problems follow from the too ready adoption in the theory of international adjudication of municipal law concepts, such as 'equity', and theories of the nature and function of the judicial process within a municipal legal system—including attempts to distinguish 'judicial' and 'legislative' functions, 'legal' and 'political' methods of dispute settlement, and the application of 'legal' and 'political' criteria in resolving disputes.² Such an approach may be of interest *de lege ferenda*: it does not necessarily illuminate the present operation of the international judicial process.

The immediately notable characteristic of the literature relating to the powers of international tribunals is, indeed, the number of distinctions drawn. And, as Moore once remarked:

¹ See below, p. 113.

² See below, pp. 5 et seq.

So prone is the human mind to distinctions that even those who share them seldom draw from them identical conclusions.¹

Thus, it is customary to distinguish diplomatic from judicial methods of dispute settlement, justiciable from non-justiciable disputes, legal from political disputes, conflicts of right from conflicts of interests, legal from political claims, law from equity (and at least three functions of equity have been distinguished), law and equity from political considerations or 'expediency', and the application of law from legislation. A further characteristic is the indeterminate content of the expressions used, such as 'law', 'equity' and 'expediency'. It may be useful to examine briefly these distinctions and the content of the concepts used, in so far as they bear on the authority of international tribunals in general.

The major relevant theoretical distinction is that drawn between the 'diplomatic' and the 'judicial' settlement of disputes. Thus the procedures of negotiation, good offices and mediation, fact finding and conciliation are dubbed 'diplomatic', while arbitration and judicial settlement by permanent courts are claimed as 'judicial'.² This broad distinction refers in part to the procedural characteristics of the different methods. More substantially, it relates to whether the settlement has been accepted in advance as 'binding' or not, and particularly to the substantive rules applied by the tribunal to reach its decision. Thus arbitration, and *a fortiori* judicial settlement, may be distinguished from diplomatic procedures because (i) they involve a binding decision, and (ii) they are made on the basis of respect for law.³ At this point terminological difficulties arise. In the *Mosul Boundary* case the Permanent Court felt it necessary to distinguish two meanings of the term 'arbitration': a 'wide sense'—implying only the first characteristic—and a 'more limited conception' implying the second characteristic also.⁴

¹ *International Adjudications*, vol. 1, p. xlix.

² See, e.g., Renault, in preface to Lapradelle and Politis, *Recueil des arbitrages internationaux*, vol. 1; and *ibid.*, p. xx; Moore, *International Adjudications*, vol. 1, pp. xxxvi et seq. Mérignhac, *Traité de droit public international*, describes mediation and good offices as legal forms of dispute settlement—distinct from arbitration only in involving a recommendatory, as distinct from an obligatory, award.

³ See the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907, Article 37: 'International arbitration has for its object the settlement of differences between states by judges of their own choice, and on the basis of respect for law.' Many writers emphasize that arbitration is a 'judicial' process: see, e.g., Carlston, *The Process of . . . Arbitration*, pp. 259 et seq.; Hudson, *International Tribunals*; Moore, *op. cit.* (in the preceding note). J. B. Scott sought to distinguish adjudication on the basis of respect for law from the application of principles of law: arbitrators might respect the law without following it. See *An International Court of Justice*, pp. 64–5, and Hedges, this *Year Book*, 7 (1926), pp. 110 et seq. Similar observations (in *The Status of the International Court of Justice*, pp. 21–6) were quoted by Judge Kellogg in the *Free Zones* case, *P.C.I.J.*, Series A, No. 24, pp. 34–5; Hudson, 2 *W.C.R.* 722 at p. 738, and see *ibid.* for Kellogg's own views on the distinction between arbitration and judicial settlement.

⁴ See *P.C.I.J.*, Series B, No. 12; Hudson, 1 *W.C.R.* 722 at p. 738. See also Borel, *Annuaire de l'Institut de droit international* (1934), p. 210. Definitions implying the 'wide sense' of arbitration are found, e.g., in Fachiri, this *Year Book*, 9 (1928), p. 128, and Kozhevnikov (ed.), *International Law*, p. 384.

The existence of these two substantially different conceptions of arbitration is often left inexplicit in theoretical writings; and writers concerned to emphasize the 'judicial' character of arbitration often try to show that the narrower conception is now the accepted and predominant one.¹ It would, however, be mistaken to regard the broader conception of arbitration as obsolete: the continued provision in treaties for the peaceful settlement of disputes for the reference of disputes to arbitration *ex aequo et bono*;² the criticisms by States of the International Law Commission's draft on arbitral procedure because it contained provisions inappropriate to non-judicial arbitration;³ and renewed proposals for an 'international equity tribunal',⁴ are sufficient evidence of that.

Conflict between these two notions of arbitration appears in three contexts in particular:

(1) Arbitral procedures—including the choice of arbitrators. Emphasis is laid by some jurists on the need to ensure that an award is finally made despite the opposition of one of the parties, once an obligation to arbitrate has been accepted. The desirability that the arbitrators be impartial and versed in international law may also be emphasized. Others emphasize the flexibility and lack of constraint in traditional arbitral procedures, which should, in their view, be maintained in order to distinguish arbitration from judicial settlement by permanent courts.⁵

(2) The rules to be applied by the tribunal in reaching its decisions, and also the type of dispute which should be referred to it.⁶

¹ Cf. *Mosul* case above; see also Scelle's reports on arbitral procedure to the I.L.C., *I.L.C. Yearbook* (1950—II), p. 114; (1951—II), p. 110; (1952—II), p. 1; (1957—II), p. 1; (1958—II), p. 1.

² See, e.g., the European Convention for the Peaceful Settlement of Disputes (1957), Art. 26.

³ See the discussions within the I.L.C., in *I.L.C. Yearbook* (1950—I); (1952—I); (1953—I); (1957—I); (1958—I); and 'Reports' of the I.L.C. in (1950—I); (1952—II); (1953—II); (1957—II); (1958—II). And for comments by governments on the drafts see 'Report of the I.L.C. on its 5th Session' (1953), Annex 1, *ibid.* (1953—II), and *G.A.O.R.*, Supplement 9 (8th Session), and Doc. A/2899 and Add. 1 and 2, *ibid.*, Annexes, Agenda item 52, 10th Session. For discussions of the draft in the 6th Committee see the *G.A.O.R.*, 8th session (382nd to 389th meetings), 10th session (461st to 472nd meetings), 13th session (554th to 567th meetings). For the reports of the 6th Committee and the resolutions of the General Assembly, see *G.A.O.R.*, Annexes (8th session) Agenda item 53; same (10th session) agenda item 52; same (13th session) Agenda item 57.

⁴ See Sohn, 'The Function of International Arbitration Today', *Recueil des cours*, vol. 108, pp. 1 et seq.; International Law Association, *Report of 52nd Conference, Helsinki, 1966*: Report of Committee, pp. 325 et seq., Resolution, pp. 318–19. On the particular advantages of arbitration for adjudication *ex aequo et bono* (rather than judicial settlement) see the Circular Note of the Secretary General of the Permanent Court of Arbitration (unofficial English translation in *American Journal of International Law*, 54 (1960), p. 933), quoting on this point Charles de Visscher, *Recueil des cours*, vol. 86, p. 551.

⁵ The conflict between these two conceptions was sharply provoked by the International Law Commission's draft on arbitral procedure—and quite decisively and negatively resolved in favour of the traditional or 'diplomatic' conception. See the comments by Governments, discussions of drafts in the 6th Committee and General Assembly Resolutions in *loc. cit.* above, n. 3.

⁶ See below regarding 'justiciable' and 'non-justiciable' disputes, 'law' and 'equity' etc., pp. 8 et seq.

(3) Terminology and classification. It may, for example, be asserted that arbitration *ex aequo et bono* is not 'arbitration' at all because it is not based on law. It has therefore been suggested that it be classified as 'conciliation'.¹ This reclassification, however, ignores the fact that the term 'conciliation' is generally accepted as referring to a procedure the final end of which is a 'recommendation' not a binding decision. Terminological confusion is enhanced by the suggestion that certain 'conciliation' commissions should be classified as arbitral tribunals—for the very reason that their decisions are accepted in advance as binding.² The decision of the '*amiable compositeur*' raises a difficulty similar to that of arbitration *ex aequo et bono*. Some writers regard the two terms as synonymous; others regard the terms as describing distinct procedures, and the *amiable compositeur* as having wider powers (especially of 'compromise') than the arbitrator *ex aequo et bono*.³ A further problem of terminology and classification is raised by 'binding' decisions intended to settle disputes made by characteristically 'political' or 'diplomatic' bodies—e.g. heads of State, diplomatic conferences, organs of international institutions. These may or may not be described on their face as 'awards' or 'arbitrations'.⁴ With regard to territorial settlements, at least,

¹ See, e.g., *Report of a Study Group on the Peaceful Settlement of International Disputes* (David Davies Memorial Institute of International Studies), Memorandum on Conciliation, p. 85, Memorandum on Arbitration, p. 93 n. 9 (noting the lack of uniformity in terminology). For an example of the problems of classification, see, e.g., *International Law Reports*, 29, pp. xix–xx.

² *Ibid.*, p. 85.

³ These different views are found, e.g., in the discussions in the International Law Commission of Scelle's report on arbitral procedure. Scelle's view was that all tribunals had the authority to adjudicate *ex aequo et bono*, i.e. *praeter*, but not *contra legem*, in his terminology. Decisions *contra legem* were thus the preserve of the *amiable compositeur*. See his report in *I.L.C. Yearbook* (1951–II), p. 118; (1952–II), pp. 38–9; for discussion of the question, see (1952–I), pp. 18–20.

⁴ See, generally, Hertslet, *The Map of Europe by Treaty*, and *The Map of Africa by Treaty*, Hackworth, *Digest of International Law*, Whiteman, *Digest of International Law*, vols. 1–3, for territorial and frontier settlements by diplomatic conferences from the Congress of Vienna onwards. Examples of 'arbitral awards' include President Wilson's determination of the territorial frontiers of the newly established Armenian State (Hackworth, *op. cit.*, vol. 1, p. 715); (particularly interesting because it includes an explanation of the reasons motivating it: the need for a 'natural frontier'; 'geographical and economic unity for the new state'; ethnic and religious factors of the population were taken account of so far as compatible; security, and the problem of access to the sea, were other important considerations). Also the Vienna Awards of 1938 and 1940 which are not motivated: see Whiteman, *op. cit.*, vol. 3, at pp. 145 et seq. and pp. 139 et seq. respectively. For reference to the General Assembly of the U.N. under the Treaty of Peace with Italy (1947), Art. 23 and Annex XI of the 'final disposal' of the Italian territories in Africa (Libya, Eritrea and Italian Somaliland) and 'the appropriate adjustment of their boundaries' see *ibid.*, pp. 15 et seq. This is also interesting for the explicit statement of considerations to be taken account of by the Four Powers (or, failing their agreement, by the General Assembly): 'the wishes and welfare of the inhabitants and the interests of peace and security, . . . [and] the views of other interested Governments'. (Annex XI, para. 2). These are repeated in substance in the relevant resolutions of the General Assembly: e.g. Res. 289 A (IV) ('. . . having taken into consideration the wishes and welfare of the inhabitants of the territories, the interests of peace and security, the views of the interested Governments and the relevant provisions of the Charter . . .'), Res. 390 A (V) (on Eritrea) 'Whereas by paragraph 2 of . . . Annex XI such disposal is to be made in the light of the wishes and welfare of the inhabitants and the interests of peace and security, taking into consideration the views of interested governments. . . .' The reasons for the recommendation are then set out in detail. Texts of resolutions are in Whiteman, *op. cit.*, vol. 3,

it has been suggested that these bodies may be acting 'judicially'—at any rate if they decide 'in accordance with the law'.¹ In the *Mosul* case the Permanent Court was prepared to regard a decision of the Council of the League of Nations on the course of a boundary as an 'arbitral award' in the 'wide sense' of the term—and applied the maxim of judicial procedure that 'no one can be judge in his own suit' to the proceedings of the Council. It felt unable to regard the decision as arbitration in the more limited sense of a decision 'on the basis of respect for law' because the settlement of the dispute depended, for the most part, 'on considerations not of a legal character'. Furthermore, the Court considered that Article 13 of the Covenant referred to 'the more limited conception of arbitration' (this is surely doubtful)² which the Council—apparently because 'its first duty' was to 'settle political disputes'—was not regarded as fulfilling.³ Some clarification of terminology would, it may be suggested, ensue if the term 'arbitration' were reserved for any procedure involving or intended to involve the elementary standards of judicial procedure, and, *a fortiori*, to decisions made on the basis of criteria laid down in advance. Categories of arbitration having their own peculiar characteristics or procedure or substantive norms to be applied could then be distinguished by appropriate adjectives.

A further reflection of the two concepts of arbitration is to be found in the distinction drawn between 'justiciable' and 'non-justiciable' disputes.⁴

pp. 21 et seq. Cf. Fischer Williams, this *Year Book*, 7 (1926), p. 24, esp. p. 34, and see below, pp. 99 et seq. and pp. 105 et seq. Also 'general comment' in Whiteman, *ibid.*, pp. 1-4, who states, *inter alia* (p. 2) that 'the postwar diplomats . . . were more concerned with the problem of fixing boundaries which would serve the interests of peace and security than with the problem of determining appropriate ethnic lines'. In the provisions quoted, however, 'the wishes and welfare of the inhabitants' are linked with 'the interests of peace and security'—obviously the two are interconnected and cannot be isolated. Cf. the Atlantic Charter and the whole question of self-determination, and see Fischer Williams, *loc. cit.*, and Kozhevnikov (ed.), *International Law*, pp. 185 et seq. Cf. also the views of Holdich (in *Political Frontiers and Boundary Making*) who regarded the ideal boundary as combining regard for 'strategic and ethnographical' factors.

¹ Brownlie, *Principles of Public International Law*, p. 127 n. 8. Cf. *P.C.I.J.*, Series B, Advisory Opinion No. 8 (*Jaworzina* case) at pp. 29, 38. See also Lapradelle, *La Frontière*, pp. 132-40.

² In view of the failure to distinguish arbitration on a basis of law from arbitration *ex aequo et bono* in Article 13 and the elaborate system of dispute settlement set up by bilateral and multilateral treaties of League members. See below, pp. 9 et seq.

³ See above, p. 5 n. 4.

⁴ For recent discussion of this question, see the *Reports of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States*: U.N. Documents A/5746/(1964), pp. 77-109; A/6230/(1966), pp. 76-124; A/6799/(1967), pp. 165-84 (Summary Records A/AC 119/SR 18-24, A/AC 125/SR 27-33, 49, 74-5, 79-80). Also *Report of a Study Group on the Peaceful Settlement of Disputes* (David Davies Memorial Institute of International Studies). It has, of course, been asserted by some jurists that there is no inherent difference between 'justiciable' and 'non-justiciable' disputes: see, e.g., Brierly, *op. cit.* (above, p. 2 n. 3); Castberg, *Recueil des cours*, vol. 35, pp. 409-10; Lauterpacht, 'La Théorie des différends non justiciables en droit international', *ibid.*, vol. 34, p. 499; and *The Function of Law in the International Community*; Politis, *La Justice internationale*, pp. 72 et seq. Nevertheless, there are sensible reasons for not submitting disputes to international tribunals: see the Reports

These terms cover two different types of distinction which have been made in treaties for the settlement of disputes.¹ The first, and earliest, reflects the wider notion of arbitration as simply involving a binding decision. It distinguishes disputes to be referred to arbitration (sometimes further limited to 'legal' disputes, sometimes not) from disputes not arbitrable because they affect 'the vital interests, the independence, or the honour of the two contracting parties' (these may also be further limited).² The distinction here is one primarily of the importance of the dispute—whether it may safely be left to third party decision.³

The second and later type of distinction reflects the narrower notion of arbitration and judicial settlement as involving the application—normally—of law. Disputes are distinguished by a variety of formulae, all indicating a distinction between 'legal' and 'political' disputes both as to their inherent character and as to the procedures and substantive rules to be applied to their settlement. Thus, only disputes 'of a legal nature'⁴ may be submitted to arbitration, or, perhaps more narrowly, any dispute . . . mainly political . . . [which] . . . does not allow of a decision based exclusively on legal principles'⁵ may be excluded from the obligation to arbitrate.

A further refinement of the concept of disputes of a legal nature was the enumeration of certain categories of dispute as appropriate to arbitration or judicial settlement. This appears most notably in Article 13 of the League Covenant and Article 36 of the Statute of the Permanent Court, and is repeated in substance in many bilateral treaties.⁶ The Locarno formula

of the Special Committee referred to above, and Brierly, *op. cit.*; Lauterpacht, 'Some Observations on the Prohibition of "non liquet" and the Completeness of the Law', in *Symbolae Verzijl*, p. 196 and Stone, 'Non liquet and the Function of Law in the International Community', this *Year Book*, 35 (1959), p. 124 and *Legal Controls of International Conflict*, p. 153; and see below, p. 18.

¹ See, generally, Habicht, *Post-War Treaties for the Pacific Settlement of International Disputes* (covering 1918 to 1928); League of Nations, *Arbitration and Security—Systematic Survey of the Arbitration Conventions and Treaties of Mutual Security Deposited with the League of Nations*; United Nations, *Systematic Survey of Treaties for the Pacific Settlement of Disputes 1928–1948*; and *A Survey of Treaty Provisions for the Pacific Settlement of International Disputes 1949–1962*. Also Permanent Court of Arbitration, *Traité généraux d'arbitrage communiqués au Bureau International de la Cour Permanente d'Arbitrage*.

² See Habicht, *op. cit.* (in the preceding note), pp. 992 et seq. for other reservations including the Monroe Doctrine, the Covenant of the League of Nations, territorial integrity, constitutional principles, interests of third powers, matters solely within the domestic jurisdiction, procedure before national courts, past disputes. See also U.N., *Systematic Survey*, pp. 23 et seq.

³ See, e.g., Habicht, *op. cit.*, pp. 992–3: 'Such reservations excluded from judicial procedure those disputes which are most dangerous and most likely to lead to a rupture. The value of such treaties is thus reduced to an undertaking to resort to arbitration only in cases which are of secondary importance, and which do not affect too deeply the sensibilities of both parties.' This is not necessarily a bad idea: cf. Brierly, *op. cit.* (above, p. 2 n. 3). See also Borel, *Annuaire de l'Institut de droit internationale* (1934), p. 185.

⁴ See examples cited in Habicht, *Post-War Treaties for the Pacific Settlement*, p. 972; and U.N. *Systematic Survey*, pp. 59 et seq.

⁵ Habicht, *op. cit.* (in the preceding note).

⁶ Habicht, *ibid.*, pp. 972–3; U.N. *Systematic Survey*, pp. 59 et seq.

distinguished as appropriate to arbitral or judicial settlement: 'All disputes of every kind . . . with regard to which the Parties are in conflict as to their respective rights.'¹ A more complex formula, which combines both the concept of a claim of 'right', and the inherent justiciability of the dispute by the application of 'the principles of law or equity' is found in a series of United States treaties.²

With the existence of permanent courts, however, a further degree of sophistication has elaborated the broad categories of 'justiciable' and 'non-justiciable' disputes. The existence of this procedure of judicial settlement appropriate to the list of 'legal disputes' enumerated in Article 36 of the Statute of the International Court of Justice has provoked a further distinction between disputes appropriate to judicial settlement and disputes appropriate to arbitration.³ Thus, some treaties provide for the compulsory adjudication of 'disputes with regard to which the parties are in conflict as to their respective rights' and arbitration of all other disputes.⁴ With regard to these latter 'arbitrable' disputes, it is sometimes provided that the tribunal adjudicate *ex aequo et bono*.⁵ Where this type of distinction is made, it is common to require the submission of the residuary category of disputes, not submitted to adjudication by a permanent court, to conciliation before arbitration.⁶ In this case, arbitration is simply a means of securing an award binding on a party unwilling to accept a conciliatory recommendation.

But although these distinctions between procedures appropriate to certain types of dispute are found in some treaties, they are not found in all. Thus, some treaties provide for the arbitration, or the judicial settlement of *all* disputes; and sometimes they distinguish between disputes to be adjudicated *ex aequo et bono*, sometimes not.⁷ Indeed, writers have pointed out that there is no inherent distinction between justiciable and non-justiciable disputes in the sense of legal and political disputes, since all disputes may be settled on the basis of law. Here, however, some writers enter *caveats* as to the advisability of referring disputes to judicial procedures in certain cases, particularly where the law is doubtful—because of the consequent heavy 'legislative' burden on the courts—or where the law is clear but unacceptable to one of the parties.

¹ Habicht, *op. cit.* (in the preceding note), pp. 973-4.

² *Ibid.*, pp. 974-5.

³ Cf. Borel, *loc. cit.* (above, p. 9 n. 3), p. 185.

⁴ Habicht, *op. cit.* (above, p. 9 n. 4), pp. 982 and 983.

⁵ *Ibid.*, p. 975. Cf. General Act for the Pacific Settlement of International Disputes (1928), Art. 28 (*ibid.*, p. 945), and European Convention for the Peaceful Settlement of Disputes (1957), Art. 26. (U.N. *Survey of Treaty Provisions for the Pacific Settlement of International Disputes* 1949-1962, p. 64).

⁶ Habicht, *op. cit.* (above, p. 9 n. 4), p. 982.

⁷ *Ibid.*, pp. 978, 982, 984; U.N. *Systematic Survey*, pp. 3, 8. Habicht distinguishes eleven different systems of pacific settlement; the U.N. *Systematic Survey* distinguishes sixteen: see *ibid.*, pp. 3 et seq.

The elaboration of a great variety of procedures for pacific settlement of disputes has led, not only to the drawing of fine distinctions in the types of dispute to be submitted to each procedure, but also to distinctions in the task of each procedure and the norms to be applied in it. Thus, the major emphasis in the so-called diplomatic third party procedures is on investigating facts, reconciling opposing claims and bringing the parties to an agreement.¹ Clearly, these procedures do not involve the application of abstract principles of law, but they do require the consideration of claims often based on supposed rules of law.² Thus, say, the report of a conciliation commission or commission of inquiry may be expected to contain 'legal considerations',³ and its recommendations may be specifically required to be 'in its opinion . . . pertinent, just and advisable'.⁴ The major feature of these diplomatic procedures, however, is not that they are characterized by the requirement to apply any particular rules to reach their decision—whether specifically political or legal considerations—but rather that they are relatively unhampered. It is, on the contrary, characteristic of procedures of binding settlement that they are restricted in the rules to be applied. This is natural enough, for it gives the parties a degree of security as to the scope of the resulting decision, and some greater control over it.⁵

Thus, treaties providing for procedures of binding settlement tend to elaborate rules for the resolution of disputes. But this is only possible to do in detail in *ad hoc compromis*.⁶ Consequently general treaties of pacific settlement employ vaguer terms: for example, 'on the basis of respect for law', 'in accordance with the principles of law and equity', 'the principles of international law', 'the rules of international law', 'in accordance with considerations of equity' or '*ex aequo et bono*', 'in accordance with the principles of justice and equity' or confer 'the powers of an *amiable compositeur*'—or 'special umpire' or 'friendly arbitrator' or 'special referee' or 'friendly mediators'. More elaborate formulae are to be found in the Statute of the Permanent Court and of the International Court of Justice, and these and similar formulae are to be found in other multilateral and bilateral treaties.⁷

¹ See Habicht, *op. cit.* (above, p. 9 n. 4), pp. 1021 et seq. (on commissions of investigation and conciliation); *Systematic Survey*, pp. 243 et seq. (on conciliation); Hague Convention for the Pacific Settlement of International Disputes, 1907, Art. 4 (on mediation).

² Habicht, *op. cit.*, pp. 1021–2 (on Bryan treaties).

³ *Ibid.*, pp. 1023–4.

⁴ Washington Convention for the Establishment of International Commissions of Inquiry, 1923; Habicht, *ibid.*, p. 1024.

⁵ See also Borel, *loc. cit.* (above, p. 9 n. 3). These are simply the most salient characteristics of the two types of procedures; the categories, of course, overlap considerably.

⁶ See below for examples in boundary and territorial disputes, at p. 21.

⁷ See in general Habicht, *op. cit.* (above, p. 9 n. 4), pp. 1048 et seq., and U.N. *Systematic Survey*, pp. 116 et seq. for examples.

The significance of these formulae has provided a fertile field of speculation for writers. For at any rate one thing is clear: they are intended to restrict or define in some way, by reference to some criteria, the powers of tribunals empowered to make binding settlements. To go outside these limits could, therefore, entail an *excès de pouvoir* and perhaps the nullity of the settlement. This problem can be approached from two directions: either by defining the criteria excluded, or by defining more closely the criteria included. Neither approach yields a satisfactory solution, for all attempts to distinguish considerations which judicial tribunals may or may not take account of meet with two obstacles. First, there is an obvious requirement that if a dispute is referred to a tribunal by consent of both parties for settlement, the tribunal should, without too fine a regard for technicalities, settle the dispute.¹ Second, any tribunal must obviously pay close attention to all the facts offered for its consideration by the parties—for there are no general exclusionary rules of evidence in the practice of international tribunals.²

Writers—and sometimes arbitrators and judges—do however attempt to draw broad distinctions between ‘legal’ and ‘political’ considerations (or ‘expediency’). Only the former may, it is said, be applied by truly judicial bodies, while the latter are generally applied by ‘diplomatic’ tribunals, or perhaps (and this is sometimes doubted)³ by judicial tribunals if specifically authorized by the parties.⁴ No practical dividing line is, however, offered; but in practice, this or that consideration may be dubbed ‘essentially political’ rather than legal,⁵ and impliedly, unsuited to application by a

¹ Borel, loc. cit. (above, p. 9 n. 3). Technically, this is sometimes put in terms of a prohibition of a *non liquet*. See particularly, H. Lauterpacht, *The Function of Law in the International Community* and in *Symbolae Verzijl*; and de Visscher, *Problèmes d'interprétation judiciaire en droit international public*, pp. 22 et seq. See also the I.L.C. Model Rules on arbitral procedure, Art. XI. Other writers deny that there is any general rule to this effect: see, e.g., Politis, *La Justice Internationale*; Stone, *Legal Controls of International Conflict*, and ‘*Non liquet* and the Function of Law in the International Community’, this *Year Book*, 35 (1959), p. 124. It is, at least, doubtful whether there is any rule one way or the other: probably the question is better seen in terms of the authority of the tribunal in individual cases, self-restraint and prudence on the part of tribunals entrusted with delicate and controversial questions, and regard for the acceptability of individual decisions to the parties and generally. See further below, p. 94.

² See, e.g., Sandifer, *Evidence before International Tribunals*, pp. 1–23.

³ See, e.g., the observations of Judge Kellogg in the *Free Zones* case.

⁴ See the *Free Zones* case.

⁵ In the context of territorial and boundary questions, see, e.g., Jennings, *Acquisition of Territory in International Law*, pp. 69 et seq. (listing particularly geographical, historical considerations, and self-determination. See also his criticism of the concept of consolidation); Lindley, *The Acquisition and Government of Backward Territory in International Law*, pp. 207–36 (spheres of influence, geographical contiguity, economic and political considerations, security). Judicial pronouncements include Huber, in the *Island of Palmas* award, on ‘contiguity’, *R.I.A.A.*, vol. 2, p. 829, at pp. 854–5, 870; also *Island of Lamu* award, Moore, *International Arbitrations*, vol. 5, p. 4940; Judge McNair, in the *Anglo-Norwegian Fisheries* case, *I.C.J. Reports*, 1951, pp. 158 et seq., esp. pp. 169, 171, 184 (on economic and social interests, geographical peculiarities and the activities of private individuals); also Judge Read, *ibid.*, p. 193 (geographical peculiarities). But contrast the judgment of the Court, referring to the same considerations in support of

judicial tribunal. However, there is frequently so much difference of opinion on any one particular consideration that it may be doubted whether any dividing line exists.¹

The second approach has provoked a more extensive literature: this related in particular to the significance of the term 'equity', and to the relationship between the application of 'law' and 'legislation'.² Here again, theoretical distinctions do little more than point the virtual impossibility of applying them in practice—or at least of securing any degree of agreement on their application.

Three functions of 'equity' have been distinguished:³

(1) The modification of law to apply it to particular facts;⁴

its decision, at pp. 127–30, 133 and especially Judge Alvarez, *ibid.*, p. 145, esp. at pp. 149 et seq. On considerations of a topographical, historical and cultural nature, see Judge Fitzmaurice in the *Temple* case, *I.C.J. Reports*, 1962, pp. 53–4. See also the *North Sea Continental Shelf* cases, *ibid.*, 1969, p. 4. See generally below for discussion of the significance of these concepts in judicial decisions.

¹ See, e.g., the *Anglo-Norwegian Fisheries* case. In a different context the two contentious phases of the *South-West Africa* cases (*I.C.J. Reports*, 1962, p. 465, and *ibid.*, 1966, p. 4) offer contrasting views of the legal relevance of 'moral principles'. Cf. *Corfu Channel* case, *ibid.*, 1949, p. 4 at p. 22.

² See below, pp. 17 et seq.

³ There is a large literature on this subject, of which the following are perhaps the most important examples: Carlston, *The Process of International Arbitration*, p. 155; Castberg, 'L'Excès de pouvoir dans la justice internationale', *Recueil des cours*, vol. 35, p. 368; 'La Méthodologie du droit international public', *ibid.*, vol. 43, p. 313, esp. pp. 362 et seq.; Feller, *The Mexican Claims Commission*, pp. 225 et seq.; Friedmann, *The Contribution of English Equity to the Idea of an International Equity Tribunal*; Habicht, 'Le Pouvoir du juge international de statuer "ex aequo et bono"', *Recueil des cours*, vol. 49, p. 277 (English translation as *The Power of the International Judge to Give a Decision 'Ex Aequo et Bono'* in the series of New Commonwealth Research Institute Monographs); Hudson, *The Permanent Court of International Justice*, p. 615, and *International Tribunals*, pp. 99 et seq.; *Annuaire de l'Institut de Droit International* (1934), pp. 186 et seq.; Report by Borel on 'La Compétence du juge international en équité', and comments thereon by Fischer Williams, Politis, Huber, Hammarskjöld, de Visscher, Wehberg, Strupp and Simons, *ibid.* (1937), p. 132; Resolution, *ibid.*, p. 271; Jenks, "'Equity" in International Adjudication', in *The Prospects of International Adjudication*, p. 316; Lauterpacht, *Private Law Sources and Analogies of International Law*, pp. 60 et seq., *The Development of International Law by the International Court*, pp. 213–17, *The Function of Law in the International Community*, p. 314, 'Règles générales du droit de la paix', *Recueil des cours*, vol. 62, p. 95; Mouskhéli, 'L'Équité en droit international', *Revue générale de droit international public* (1933), p. 347; Nielsen, *International Law Applied to Reclamations*, p. 71; Politis, *La Justice internationale*; Raelbruch, 'Justice and Equity in International Relations', in *Justice and Equity in the International Sphere* (New Commonwealth Research Institute), p. 1; Ralston, *The Law and Procedure of International Tribunals*, pp. 1 et seq., 36; *ibid.*, *Supplement*, pp. 31 et seq.; *International Arbitration from Athens to Locarno* pp. 15, 23; Schindler, 'Les Progrès de l'arbitrage obligatoire depuis la création de la Société des Nations', *Recueil des cours*, p. 33; Sohn, 'The Function of International Arbitration Today', *ibid.*, vol. 108, p. 1; Report on the 'Changing Role of Arbitration in the Settlement of International Disputes' in *International Law Association, Report of 52nd Conference* (Helsinki), p. 325; Simpson and Fox, *International Arbitration*, pp. 128 et seq.; Sørensen, *Les Sources du droit international*, pp. 191 et seq.; Stone, *Legal Controls of International Conflict*, p. 139; Strupp, 'Le Droit du juge international de statuer selon l'équité', *Recueil des cours*, vol. 33, p. 351; Witenberg, *L'Organisation judiciaire, la procédure et la sentence internationales*, p. 303.

Copious extracts from the relevant decisions of arbitral and judicial tribunals can be found in Jenks, cited above in this note; but the discussion of 'equity' in relation to the *Eastern Extension, Australasia and China Telegraph Company* case in Nielsen's *Report* is particularly interesting.

⁴ See, e.g., Huber, *Annuaire de l'Institut de Droit International* (1934), p. 233: 'La conception la plus étroite de l'équité est celle qui comporte, entre plusieurs interprétations possibles du droit,

- (2) The supplementing of law by filling in 'gaps' in the positive law;¹
- (3) The correction of law, or its supplanting as a distinct basis of decision.²

Furthermore, it now seems to be generally agreed by writers that 'equity' (in some sense) forms part of international 'law'—and therefore may and should be applied by tribunals required to apply international law—and that 'equity' (in another sense) may only be applied by tribunals specially authorized to do so—e.g. tribunals authorized to adjudicate *ex aequo et bono*, or as *amiable compositeur*.³

It will, however, be obvious from an examination of the above three classes of equity, that, although they may be distinguishable in theory, they overlap in any conceivable application in practice.⁴ Thus, the modification of law to take account of particular facts may be with difficulty distinguishable from a decision avowedly *contra legem*. Similarly, the use of equity to supplement law by filling a gap, or, as in the *North Sea Continental Shelf* cases, when 'a rule of law . . . calls for the application of equitable principles', may be indistinguishable for practical purposes from the use of equity as an independent basis of decision. This practical difficulty is emphasized by the confusion and ambiguity of the terms used. The same writer who asserts

celle qui tient le mieux compte de la situation individuelle des parties en litige et de la balance des droits et obligations correspondants. L'équité ainsi comprise s'accommode facilement avec le règlement arbitral et même judiciaire. Tout autre est la situation, si l'équité est comprise comme une base indépendante du droit pour les décisions arbitrales.' Cf. Descamps, quoted in Moore, *International Adjudications*, Modern Series, vol. 1, p. lxxxviii; de Visscher, *Annuaire de l'Institut de Droit International* (1934), p. 239; Borel, 'Rapport définitif', *ibid.*, p. 274; Judges Bustamante y Rivero and Ammoun in *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, pp. 58, 132.

¹ See, e.g., de Visscher, *ibid.*, p. 249: 'l'équité intervient ici pour combler les lacunes de l'ordre juridique international positif . . .'. See also Politis, *ibid.*, p. 228; Borel, *ibid.*, pp. 274-5; cf. Descamps, *op. cit.* (in the preceding note); Ammoun, *loc. cit.* (in the preceding note), pp. 132 et seq.

² See, e.g., Huber, *Annuaire de l'Institut de Droit International* (1934), p. 233; de Visscher, *ibid.*, p. 240; Borel, *ibid.*, p. 275. Also Castberg, *op. cit.* (above, p. 13, n. 3); and Strupp, *op. cit.* (above, p. 13 n. 3).

³ See, e.g., Institut de Droit International resolution (1875), Art. 27; *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, pp. 48 et seq.

⁴ See the classic examples of the explicit reliance on principles of 'equity' (conveniently collected in Jenks, *op. cit.* (above, p. 13 n. 3)). The principle of 'equity' referred to by Judge Hudson in the *Water from the Meuse* case, *P.C.I.J.*, Series A/B, No. 70, pp. 76-9, that 'in a proper case', the 'complete fulfilment of all its obligations under a treaty must be proved as a condition precedent to a State's appearing before an international tribunal to seek an interpretation of that treaty' might be described as modifying, or correcting law, with equal reason. The 'equitable' concepts of estoppel and acquiescence operate to deny a 'legal' right. The use of 'equity' in the *Cayuga Indians* case, Nielsen's *Report*, p. 203, was, effectively, to create a right and might be classified as either filling a lacuna in the law or as correcting the law, or as a quite independent basis of decision. The use of 'equity' in the *Norwegian Ships* case (*American Journal of International Law*, vol. 17, p. 362) and in the *North Sea Continental Shelf* cases was not dissimilar. That the use of 'equity' in all its aspects, is 'legislative' admitting of modification and development of the law is brought out by Fischer Williams, *Annuaire de l'Institut de Droit International* (1934), pp. 227-8; see also the discussion by the British Agent of the meaning of the term in the *Eastern Extension, Australasia and China Telegraph Company, Ltd.* case, Nielsen, *op. cit.*, pp. 68 et seq. And see below, p. 91.

that a wide 'legislative' power to fill gaps in the law is inherent in the judicial function in general and the powers of international judicial tribunals in particular, and that 'equity' is part of international law, may dub arbitration *ex aequo et bono* a non-judicial procedure because it involves a power of 'legislation'.¹ Conversely, it has been asserted that all tribunals have the power to adjudicate *ex aequo et bono*—in the sense that they may fill gaps in the law.² Others argue that judicial tribunals are restricted to the application of 'positive' law, and in order to fill gaps they require the additional authority to adjudicate *ex aequo et bono*.³ Or it is urged that 'Whatever the legal reasoning of a Court of justice, its decisions must by definition be just, and therefore in that sense equitable', but that this can nevertheless be distinguished from adjudication *ex aequo et bono*.⁴ A degree of terminological confusion may thus cover substantial disagreements on the powers of international tribunals, or serve to disguise adjudications *ex aequo et bono* as the 'equitable' application of law.

Some jurists, moreover, suggest that there is a difference in substance between the 'equity' applied by different tribunals. Thus, in the *Free Zones* case, Judge Kellogg distinguished the powers *ex aequo et bono* of the Permanent Court of International Justice and an arbitral tribunal. In his view:

The authority given to the Court to decide *ex aequo et bono* merely empowers it to apply the principles of equity and justice in the broader signification of this latter word.⁵

Similar powers given to an arbitral tribunal would, however, permit it to 'decide questions upon grounds of political or economic expediency'.⁶ Judge Lachs has also noted that equity has played a different role in arbitration and judicial settlement. In arbitration it had two important aspects: as an element of 'mutual accommodation' and in the decision of disputes to which legal criteria were inapplicable. In judicial settlement, however, the requirement that the court take foremost account of certain sources of law, and the narrower range of disputes submitted, limited the extent to which 'equity' might be applied.⁷

Apart from disagreements about the *function* of equity, there is little unanimity on—or elaboration of—the *content* of equity. Some writers see equity in terms of general notions of good faith, acquiescence, estoppel etc.;⁸ others in terms of the maxims of English equity;⁹ others as equivalent

¹ See, e.g., H. Lauterpacht, *The Development of International Law by the International Court*, pp. 155 et seq., esp. p. 213.

² See, e.g., Scelle, loc. cit. (above, p. 6 n. 1); cf. Fischer Williams, loc. cit. (above, p. 7 n. 4).

³ See, e.g., Politis, loc. cit. (above, p. 13 n. 3), and the resolution proposed by him in *Annuaire de l'Institut de Droit International* (1937), pp. 139–40.

⁴ *North Sea Continental Shelf* cases, p. 48.

⁵ *P.C.I.J.*, Series A, No. 24, p. 40.

⁶ *Ibid.*

⁷ *G.A.O.R.*, 6th Committee, 13th Session, Summary Records of the 563rd meeting.

⁸ See, e.g., Lauterpacht, op. cit. (above, n. 1), p. 213.

⁹ See, e.g., Jenks, op. cit. (above, p. 13 n. 3).

to 'general principles of law', 'justice' or 'objective justice';¹ other writers regard it as lacking explicit content, but rather as a process of taking account of all relevant circumstances—including political and economic factors and expediency.² It has already been mentioned that some writers regard the content of equity as differing according as it is applied as a part of international law or by an arbitrator *ex aequo et bono*—or perhaps according as it is applied in any form of arbitration as contrasted with strictly judicial procedures.³ Thus 'legally relevant equity'⁴ may be distinguished from other 'equity'. Other writers make no such distinctions as to content, but describe both the 'equity' applied by a court as part of international law and the 'equity' applied by an arbitrator *ex aequo et bono* as 'general principles of law' (or 'justice') or 'objective justice'. These writers distinguish only the procedure by which it is applied: either as supplementary to law or as a separate basis of decision.⁵ They sometimes further distinguish the powers of the *amiable compositeur* as permitting reliance on considerations of 'expediency' rather than of 'objective justice'.⁶ Other writers do not make this distinction, but regard considerations of 'expediency' as forming part of the equity applied by all international tribunals as part of international law.⁷

It is submitted that the use of the term 'equity' in the context of the process of international adjudication is unhelpful. It evokes, consciously or unconsciously, technical concepts of Roman and English law: consequently, it fails to direct attention to the substance of the matter. It is clear from the enumeration of the functions of equity which have been distinguished that the application of 'equity' is conceived as contrasted with the application of existing law. The direction to apply 'equity' or 'justice', or the like—or the power to adjudicate '*ex aequo et bono*'—is made, in arbitration agreements, to empower a tribunal to resolve a dispute, whether or not there be any positive law applicable. It is therefore best thought of simply as a power to legislate for the parties in a special, limited case. This is made clear in some arbitration treaties and discussions of the concept.⁸ Consequently, it

¹ See, e.g., Castberg, *op. cit.* (above, p. 13 n. 3), Kellogg, *loc. cit.* (above, p. 15 n. 5).

² See, e.g., Mouskhéli, *op. cit.* (above, p. 13 n. 3); also Huber, *loc. cit.* (above, p. 14 n. 2).

³ See, in general, Borel's reports to the Institut de Droit International, in the *Annuaire* (1934).

⁴ See Lauterpacht, in *Symbolae Verzijl*, p. 196.

⁵ Castberg, *op. cit.* (above, p. 13 n. 3). The significance of the reference in the P.C.I.J. Statute to 'general principles of law', and the history of the drafting of that provision is described by Schindler in *Recueil des cours*, vol. 25, p. 233; Sohn, *ibid.*, vol. 108, p. 1; and Kellogg in his observations in the *Free Zones* case.

⁶ *Recueil des cours*, vol. 108, p. 1; cf. Scelle, *loc. cit.* (above, p. 6 n. 1).

⁷ See, e.g., Mouskhéli, *loc. cit.* (above, p. 13 n. 3).

⁸ As has been pointed out, the use of the term 'equity' or '*ex aequo et bono*' is confusing: sometimes its use seems to assume that *some* rules of law are applicable to the dispute, but these are insufficient to resolve the dispute in its entirety. See, e.g., General Act for the Pacific Settlement of Disputes, Art. 28: 'If nothing is laid down in the special agreement or no special agreement has been made, the Tribunal shall apply the rules in regard to the substance of the matter

will be seen that it is immaterial whether the direction in the arbitration agreement authorizes the application of 'equity' or adjudication '*ex aequo et bono*' or the like formula. For the substance of the authority is simply the power to legislate for the individual case, whether by modifying an existing legal obligation, supplementing it, or making law for a particular case to which there appears to be no positive law applicable.

It may be thought, therefore, that the question of the extent of the authority of international tribunals might be illuminated by discussions of their 'legislative' powers. On this point, however, there is also considerable difference of opinion: some writers assert that courts do not and should not legislate, others that they do and should.¹

This question is often discussed in relation to the admissibility of a *non liquet*: some writers assert that a *non liquet* on the grounds of insufficiency or obscurity of the law is prohibited; others that it is required in just those cases.² It is certainly true that the practice of tribunals is in favour of the

enumerated in Article 38 of the Statute of the Permanent Court of International Justice. In so far as there exists no such rule applicable to the dispute, the Tribunal shall decide *ex aequo et bono*.' Cf. what is probably in substance the same provision in the European Convention for the Peaceful Settlement of Disputes. Still another way of saying the same thing is found in the Treaty of Conciliation, Arbitration and Compulsory Adjudication between Germany and Switzerland (1922) (Habicht, *op. cit.*, above, p. 9 n. 1, No. 7), Art. 5. In these treaties, the authority to adjudicate '*ex aequo et bono*' or to legislate seems to be directed at permitting a decision: (1) where the 'law' applicable is inadequate in some respect—one might instance a boundary treaty which unintentionally fails to describe a certain part of the boundary. The 'interpretation' required to fill that 'gap' is then better seen as adjudication *ex aequo et bono* or legislation; (2) where the dispute is not a 'legal' dispute, because, e.g., by customary law it falls within the domestic jurisdiction of a party and there is no treaty obligation covering the dispute, but yet the parties wish to resolve the dispute constructively—an example is the problem of State responsibility for revolutionary damage. The additional provision in Art. 5 of the German-Swiss Treaty that 'if the Parties agree, the Tribunal may, instead of basing its decision on legal principles, give an award in accordance with considerations of "equity" (or "*ex aequo bono*")' seems intended to cover yet a third possibility: that there might be rules of 'law' applicable to the dispute, e.g. a treaty provision, but that the Parties would not want the dispute decided on the basis of those principles. It can of course be argued that no special authority is needed to cover the first two cases, on the ground that the 'general principles of law recognised by civilised nations' include 'equity' and sufficient legislative authority. But although this provision in the P.C.I.J. and I.C.J. Statutes may have been interpreted by those Courts as sufficient, it appears from the history of the drafting of paragraph 2 that the '*ex aequo et bono*' provision was intended to cover the filling of 'gaps' (see Schindler, *op. cit.* (above, p. 13 n. 3), and Kellogg, *loc. cit.* (above, p. 15 n. 5)), hence Kellogg's doubts as to whether it permitted (a) the resolution of non-legal disputes; or (b) decisions *contra legem*.

On the significance of references to 'equity' or '*ex aequo et bono*' in the 'legislative' sense see Fischer Williams, *loc. cit.* (above, p. 14 n. 4).

¹ Compare, e.g., Politis, *La Justice internationale*; Fitzmaurice, 'Judicial Innovation—Its Uses and its Perils', in *Cambridge Essays in International Law*, p. 24: 'It is axiomatic that courts of law must not legislate: . . .'—but goes on to qualify this by the statement that: '. . . it is equally a truism that a constant process of development of the law goes on through the courts, a process which includes a considerable element of innovation'. The line between 'legislation' and 'development' (including 'innovation') is clearly a fine one. Contrast Lauterpacht, *The Development of International Law by the International Court*, pp. 155 et seq.

² Cf. Lauterpacht and de Visscher, *op. cit.* (above, p. 12 n. 1); contrast Politis, *op. cit.*, Brierly, *op. cit.*, Stone, *op. cit.* (above, pp. 13, 2, 8 nn. 3, 3, 4 respectively).

former view, since there are probably no recorded cases of a *non liquet* on those grounds.¹ But it is not necessarily legitimate to deduce from a general practice a rule of law: particularly when the arguments in favour of a *non liquet* in certain circumstances are cogent.

The major arguments in favour of a *non liquet* are put in terms of: (a) inherent limitations of the judicial function—that courts must not legislate or may legislate only within narrow limits;² (b) the intolerable burden of legislation that would be laid on international judicial tribunals if, in the undeveloped state of international law, they were prohibited from pronouncing a *non liquet*;³ (c) the unsuitability of international judicial tribunals—either in general or in their particular composition—to the task of legislation;⁴ (d) the restraint shown by municipal courts in refusing to adjudicate certain classes of dispute;⁵ (e) the particular desirability of similar restraint by international tribunals, in view of the lack of effective legislative bodies to reverse undesirable judicial decisions.⁶ It is not always clear from discussions of this question whether it is seen in terms of inherent limits of the judicial function in general, limitations on a particular delegated authority, or self-imposed limits of judicial policy. The weight of the arguments in favour of the *non liquet* seem to suggest the last. Thus the position is seen to be simply that (a) international judicial tribunals are endowed with legislative authority; (b) but in certain circumstances they ought not to be asked to, or if asked should refuse to, legislate.

Once it is conceded that international judicial and arbitral tribunals have some quasi-legislative authority, the question immediately arises: what criteria do they, and should they, apply in 'legislating'?⁷ In examining this question, it must be borne in mind that the legislative functions conferred on judicial tribunals usually relate to the margins of the law, rather than to its basic principles. The type of dispute referred to judicial tribunals is, and probably should remain, of secondary importance and limited scope—and characteristically of significance to only two States. Moreover, occasion for such 'legislation' is relatively rarely accorded. Consequently, the characteristic of 'judicial legislation' is that it normally elaborates recognized

¹ The usual case given is the *Award of the King of the Netherlands*.

² This seems to be the view of Politis, *op. cit.* (above, p. 13 n. 3).

³ Stone, *this Year Book*, 35 (1959).

⁴ Brierly, *op. cit.* (above, p. 2 n. 3). Cf. the reasons generally given for not submitting disputes to international tribunals, particularly the I.C.J.: see, e.g., the successive reports of the Special Committee on Friendly Relations among States (see above, p. 8 n. 4, for references).

⁵ Brierly, *op. cit.* (above, p. 2 n. 3); Brownlie, 'The Justiciability of Disputes and Issues in International Relations', *this Year Book*, 42 (1967), p. 123.

⁶ *Ibid.*

⁷ 'Legislation' is not used here in the sense of generally applicable legislation enacted by a legislature, but simply in the sense that (a) an international tribunal renders a decision which, whether or not based on pre-existing law, will be binding on the parties; and (b) this decision will be treated as a precedent of considerable persuasive force—especially in an underdeveloped branch of international law. A recent example of a decision with considerable potential interest and effect not only *inter partes*, but in general, is afforded by the *North Sea Continental Shelf* cases.

general principles on an *ad hoc* basis with respect to particular circumstances of fact. Although problems of general concern and basic principle are customarily aired in political bodies, where the interested States are represented, they are rarely referred to judicial tribunals. Indeed, it is frequently doubted whether judicial bodies—either in general or existing bodies in particular—are suited to consider this latter type of question: fundamentally because they are insufficiently representative of the general interest, being essentially organs of limited membership, or because the training of their members is perhaps inadequate to the task of broad legislation.¹

It has been pointed out above that writers have seen the concept of 'equity' as affording appropriate criteria for judicial legislation. They have, however, failed to elaborate the content of equity sufficiently to make it serviceable to resolve concrete disputes. It is plain, for example, that such concepts as general notions of good faith, the maxims of English equity, or 'general principles of law' and 'objective justice' are either inadequate or unhelpful.² The notion of 'equity' as requiring that all the surrounding circumstances, including economic and political factors and 'expediency', be taken into account, is nearer the mark. But again this is insufficiently elaborate to provide a workable set of criteria for the resolution of particular disputes. It does, however, indicate that such legislation, even when very limited in scope, is a political act, and necessarily motivated by broadly 'political' criteria.

The criteria which tribunals have applied in the past are implicit in the rules of traditional international law. These rules reflect, and may sometimes appear essentially linked to, an obsolete or obsolescent international power structure and its requirements, or at least incompatible with aspirations for change. Thus the development of the law on the acquisition of sovereignty over territory met, in its different forms, the needs of European

¹ See above, p. 18 n. 8. An obvious example in the field of territorial disputes of a matter of considerable general interest referred to an international tribunal is the *Fisheries* case (below, p. 64). The decision of the I.C.J. involved a quasi-legislative determination of the criteria governing the measurement of the territorial sea of interest and application beyond the immediate parties; and the criteria adopted were accepted in the Geneva Convention on the Territorial Sea and Contiguous Zone. See also the *North Sea Continental Shelf* cases (below, p. 81). Other questions of general importance and interest considered by the I.C.J. have been, of course, the interpretation of certain provisions of the U.N. Charter, and the *South-West Africa* and *Northern Cameroons* cases: it may be suggested that the Court's failure to resolve these in a generally satisfactory manner, or its substantial refusal to adjudicate them, is evidence that such matters are not appropriate to judicial determination for one or more of the reasons listed above.

² Certain concepts, such as good faith, acquiescence and estoppel have undoubtedly been applied in territorial and boundary disputes. But they do not provide an altogether satisfactory basis for decision: they are insufficiently sophisticated to resolve complex problems. See further below, pp. 95, 105. No doubt the tendency to compromise in this type of dispute might be seen as an application of the maxim 'equality is equity'; but again this is too crude a concept to be a satisfactory criterion for decision. The detailed criteria which might be involved in a reference to 'objective justice' are obscure, to say the least.

colonizing powers in their relations *inter se*. The doctrine of 'discovery' as a root of title, loose requirements for the acquisition of title by 'occupation' and the doubtful status of 'adverse prescription' set broad limits to possible conflicts and indicated a general principle of respect for territorial claims. Increasing competition for land areas available for colonization and commercial exploitation, and perhaps higher standards of administrative responsibility, in the nineteenth century were manifested in the theoretical requirement of a higher level of activity in order to acquire sovereignty: i.e. that occupation must be 'effective'.¹ To the extent that these rules reflect only the needs of the international society which created them, they are clearly obsolete and require revision. In so far as claims to self-determination and decolonization have been effectively made, and colonization effectively rejected, the practice of States may be said to have modified or discarded some of the traditional rules—in particular, those relating to 'occupation' and 'conquest'.² This type of claim is, however, generally formulated in political bodies. The type of territorial dispute with which international judicial tribunals have been faced has characteristically been one between established States as to the precise course of a common boundary. The traditional rules of the law of territory relate to an essentially dynamic situation: the acquisition of territory. They do not, without considerable elaboration and refinement, answer the needs of established States for stability, or minor shifts of convenience, in their boundaries.

To meet the new requirements or aspirations of international society, writers have in the context of discussions of the legislative powers of international tribunals offered guidelines as to the considerations of which tribunals should take account, and the goals at which they should aim.³ But usually these prescriptions are on a fairly high level of abstraction, and offer little concrete guidance to the solution of particular problems. Also, it is plain from the terms used—e.g. 'law of social inter-dependence', 'public order of human dignity'—that these writers mainly think in terms of solutions to large-scale problems in which the interests of all States are involved. Such problems, however, are rarely referred to judicial tribunals. These prescriptions can form a framework of principle but are insufficiently

¹ Lindley, *The Acquisition and Government of Backward Territory in International Law*; Moore, *Collected Papers*, vol. 1, p. 80; Kozhevnikov, *International Law*, p. 181.

² Cf. Jennings, *The Acquisition of Territory in International Law*, pp. 52 et seq., 78–87. With regard to 'conquest' see, e.g., reactions to the occupation by Israel of Syrian, Jordanian and Egyptian territory (and some territory of indeterminate sovereignty such as the Gaza strip) in June 1967. For references see below, p. 107 n. 1.

³ See, e.g., Lauterpacht, *The Function of Law in the International Community*; Alvarez, *Le Droit international nouveau* (and see his separate and dissenting opinions in *I.C.J. Reports*, 1948, p. 67; *ibid.*, 1949, pp. 39, 190; *ibid.*, 1950, pp. 12, 174, 290; *ibid.*, 1951, pp. 49, 145; *ibid.*, 1952, p. 124; *ibid.*, 1953, p. 73; *ibid.*, 1954, p. 67); McDougal in, e.g., 'International Law, Power and Policy: a Contemporary Conception', *Recueil des cours*, vol. 82, p. 137; Jenks, 'The Concept of International Public Policy', in *The Prospects of International Adjudication*.

detailed to resolve particular disputes.¹ Consequently, judicial tribunals must look for guidance on detailed criteria to other sources.

One obvious source of guidance is the explicit directions sometimes found in agreements for arbitration. These directions sometimes afford specific criteria for *ad hoc* arbitration. A glance through the arbitrations collected in Stuyt, *Survey of International Arbitrations* (containing arbitrations up to 1938) affords the following information. Sixty-seven boundary arbitrations, and, allowing for duplication, nineteen arbitrations of territorial disputes, are listed since the Jay Treaty Commissions. There have, in addition, been a number of other arbitrations of boundary and territorial disputes since then, and several cases—not listed by Stuyt—have been referred to the Permanent Court and the International Court. But the general picture is as follows: by far the largest group of arbitrations relate to the interpretation of treaties—usually a boundary treaty;² a few require the interpretation of a previous award,³ and one of a unilateral declaration of annexation.⁴ The next largest category make, in the *compromis*, no stipulation as to the criteria to be applied by the arbitrator;⁵ a few refer simply to ‘principles’ of international law.⁶ More interesting are those which lay down some specific criteria—either to be applied on their own, or to modify the terms of a treaty. These may be broken down into historical, strategic, ethnographical and social, economic, and geographical criteria; possession; convenience; necessity; political and State interests; and equity. The following are examples of the formulae used.⁷

¹ Thus, for example, the principle of ‘self-determination’ does not provide a rule for the solution of all territorial problems. In the form of a criterion of the wishes and affiliations of the inhabitants of disputed territory it forms one of a complex of criteria which are taken into consideration in attributing sovereignty over territory: see below, pp. 99, 106. On the relevance of self-determination to boundary modifications see Kozhevnikov, *op. cit.* (above, p. 5 n. 4), pp. 185 et seq.: ‘International law, which recognises territorial integrity as one of its fundamental principles, permits boundary changes in certain strictly defined circumstances. Under International Law and international practice, such changes are recognised as legitimate if they take place in accordance with the principle of self-determination.’

² A total of 32 (Stuyt, *op. cit.* (above, p. 21 (text)), Nos. 1, 11, 12, 13, 14, 27, 42, 61, 87, 95, 114, 129, 140, 147, 153, 163, 167, 184, 189, 193, 197, 198, 209, 224, 251, 265, 275, 278, 285, 288, 300, 336). Seven of these contain some additional direction: to modify the treaty provisions for reasons of ‘convenience’, ‘equity’ etc. (Nos. 140, 153, 285), or to apply also ‘international law’ (Nos. 275, 300, 336), or ‘internal law’ (No. 278).

³ *Ibid.*, Nos. 298 and 320. Also the *Argentine–Chile Frontier* case, below, p. 33.

⁴ Stuyt, *op. cit.*, No. 162 (the *Walfisch Bay* case, *R.I.A.A.*, vol. 11, p. 263).

⁵ A total of 24 (Stuyt, *op. cit.*), Nos. 8, 51, 52, 62, 92, 107, 111, 113, 117, 118, 141, 146, 149, 157, 159, 164, 180, 204, 206, 293, 334, 396a, 408).

⁶ *Ibid.* No. 240 (Brazil–Great Britain, below, p. 93 n. 4) is the only one which refers to these as the sole basis of decision; others (Nos. 275, 300, 366) combine reference to ‘principles of international law’ with directions to apply treaties.

⁷ For further examples of similar directions to delimitation and demarcation commissions see Lapradelle, *La Frontière*, pp. 147 et seq., and Jones, *Boundary-Making*, pp. 19, 59 et seq. On the powers of both decision and adjustment which should be given to demarcation commissions compare Holdich, *Political Frontiers and Boundary-Making*, p. 212 and Trotter, ‘The Science of Frontier Delimitation’, in *Minutes of the Proceedings of the Royal Artillery Institution*, 24 (1897),

Historical criteria. The most familiar of the specific, agreed criteria is that applied in boundary disputes amongst South and Central American States—the line of *uti possidetis* of 1810 and 1821 respectively. This principle had the useful function of excluding possible acquisition of territory by reliance on a concept of ‘effective occupation’: it excluded the status of *territorium nullius* in South and Central America. But it frequently proved inadequate to determine precise boundaries: documents defining the territories of the old Spanish and Portuguese provinces were frequently ambiguous, the border areas unexplored and unadministered and the *de jure* and *de facto* jurisdiction of these provinces did not always coincide.¹ To draw precise boundaries, therefore, tribunals frequently had to have recourse to other criteria. They were sometimes explicitly authorized to apply considerations of equity,² and they sometimes inferred such authority from the terms of the *compromis*.³

Another example of the criterion of historic possession is to be found in the first of the rules which the arbitral tribunal adjudicating on the British Guiana–Venezuela boundary was required to apply:

(a) Adverse holding or prescription during a period of fifty years shall make a good title . . .⁴

General mention of ‘historical principles’, amongst others, was made in the agreements for the settlement of boundary questions by Mixed Commissions by Latvia, Lithuania and Estonia.⁵

Possession. Apart from historical possession in the form of *uti possidetis* and prescription, some agreements explicitly exclude actual present possession from consideration unless it fulfils certain conditions. For example, the Guatemala–Honduras Convention of 1895 provides that:

Possession shall only be considered valid so far as it is just, legal, and well founded,

p. 207; and see in general Jones, *op. cit.*, pp. 192–6, and (for particular examples of ‘faulty delimitation’) pp. 66–71.

¹ See Lapradelle, *La Frontière*, pp. 76 et seq., and, e.g., the *Honduras Borders* case (*R.I.A.A.*, vol. 2, p. 1307). Express references to the *uti possidetis* criterion are found in Stuyt, *op. cit.* (above, p. 21), Nos. 121, 249, 393. For similar criteria establishing the boundaries of newly independent States in Africa and Asia see the resolution adopted at the O.A.U. Conference of Heads of State and Governments at Cairo in July 1964 (O.A.U. Doc. AHG/Res. 16 (I)) and the *Temple* and *Rann of Kutch* cases.

² See Stuyt, *op. cit.* (above, p. 21), No. 249 (*Bolivia–Peru*, 1902), Art. 4: ‘Wherever the royal acts and dispositions do not define the division of a territory in clear terms, the arbitrator shall decide the question according to equity, keeping as near as possible to the meaning of these documents and to the spirit which inspired them’ (*Text of Award in American Journal of International Law* (1909), p. 1029; *British and Foreign State Papers*, vol. 105, p. 572). The Award was controversial: see Carlston, *op. cit.* and Nantwi, *op. cit.* (above, p. 3 n. 4).

³ *Guatemala–Honduras* case below, p. 50; cf. *Honduras–Nicaragua* case, below, p. 42.

⁴ Stuyt, *op. cit.*, No. 207; Award, not reasoned, in *British and Foreign State Papers*, vol. 92, p. 160.

⁵ Stuyt, Nos. 331 and 336: ‘In arriving at their decision the Commission will take into account ethnographical and historical principles and the State-political interests of each party (military, strategical, economical and communicational) and the interests of the local population.’

in conformity with general principles of equity, and with the rules of justice sanctioned by the law of nations.¹

Other agreements expressly require that present occupation by subjects of either party, and acquired interests in general, be taken into consideration. The Great Britain–Venezuela Convention of 1897, amongst the rules which it set out for the determination of the British Guiana boundary, provides that:

In determining the boundary line, if territory of one party be found by the Tribunal to have been at the date of this Treaty in the occupation of the subjects or citizens of the other party, such effect shall be given to such occupation as reason, justice, the principles of international law, and the equities of the case shall, in the opinion of the Tribunal, require.²

Some other agreements refer to 'equity' as a basis for deviating for reasons of 'necessity' or 'convenience' from a boundary determined on other criteria.³

Ethnographical and social criteria. The Conventions between Latvia, Lithuania and Estonia required 'ethnographic' principles to be taken into consideration, as well as, in general terms, 'the interests of the local population'.⁴ An early example of the application of interests of the local population is to be found in the treaty between Nassau and Prussia of 1815. This provides for delimitation of the boundary by Commissioners and requires that:

Les Commissaires . . . auront un soin particulier pour que les rapports communaux, ecclésiastiques et industriels, actuellement existants, soient maintenus.⁵

Economic factors. In the boundary treaty between Nassau and Prussia mention is made explicitly of 'les rapports . . . industriels', and the treaty goes on to provide that ' . . . sous les rapports industriels sont spécialement compris ceux qui regardent l'exploitation des mines'.⁶ Reference is made to 'economic and transit interests' in the Conventions between Latvia, Lithuania and Estonia.⁷

Geography. The specific requirement that geographic factors be taken into consideration is found in the Nassau–Prussia Convention of 1815: 'Les Commissaires se conformeront au principe de la contiguïté de ces

¹ Stuyt, *ibid.*, No. 185. See also No. 184 (*Honduras–Salvador*) and No. 249, and *American Journal of International Law* (1909), Official Documents, p. 384 (*Bolivia–Peru*).

² Stuyt, No. 207. See also the Guatemala–Honduras Convention of 1930, *R.I.A.A.*, vol. 2, p. 1307, and below, p. 50.

³ See, e.g., Stuyt, Nos. 271 (*Colombia–Peru*, 1904), 281 (*Colombia–Peru*, 1905), 285 (*Colombia–Ecuador*, 1907).

⁴ See above, p. 22 n. 5.

⁵ Stuyt, No. 17. See also the Protocol for the delimitation of the Afghan frontier (*Great Britain–Russia*), *ibid.*, No. 140.

⁶ *Ibid.*, No. 17.

⁷ *Ibid.*, Nos. 331 and 336.

portions avec les territoires respectifs.' In the Conventions between Latvia, Lithuania and Estonia, reference is made to 'transit' and 'communicational' interests.

Strategic factors. These are explicitly mentioned ('military, strategic' interests) in the Conventions between Latvia, Lithuania and Estonia.

Political and State Interests. The Latvia, Lithuania and Estonia Conventions provide that '... the Commission shall take into consideration ... the political and State interests of each country (such as military, strategic, economic and transit interests) ...'.

Convenience and necessity. A number of arbitration agreements on boundary disputes require account to be taken of 'convenience' and 'necessity'. For example, the Colombia-Ecuador Convention of 1907 provides that:

The arbiters ... may, leaving to one side strict law, adopt an equitable line in accordance with the necessities and convenience of the two countries.¹

The Guatemala-Honduras Convention of 1895 provides that:

The respective Governments may, if they hold it to be necessary or convenient, adopt the system of equitable compensation, bearing in mind the rules and usages established in international practice.²

Equity. Some conventions authorize the tribunal, in case it is unable to decide wholly in favour of either claim, to decide on the basis of equity or some more detailed criteria. Thus, the Great Britain-Portugal Convention of 1872 regarding claims to Delagoa Bay provided that:

Should the Arbitrator be unable to decide wholly in favour of either of the respective claims, he shall be requested to give such a decision as will, in his opinion, furnish an equitable solution of the difficulty.³

The Bolivia-Peru Treaty of 1902 provided that the tribunal should decide on the basis of the *uti possidetis* of 1810, but added:

Whenever the royal acts and dispositions do not define the dominion of a territory in clear terms, the Arbitrator shall decide the question according to equity, keeping as near as possible to the meaning of those documents and the spirit which inspired them.⁴

Other agreements lay down quite generally that a boundary be determined on the basis of 'justice', 'equity' or 'fairness'. These concepts are no doubt synonymous. A variety of formulae have been adopted: commissioners have been required to decide 'to the best of their judgment, and according to justice and equity';⁵ to fix 'the most equitable delimitation';⁶

¹ Stuyt, No. 285.

² Ibid., No. 185.

³ Stuyt, No. 100. See also the Convention of 1869 regarding the Island of Bulama: *ibid.*, No. 85.

⁴ Ibid., No. 249.

⁵ Ibid., No. 61 (*Great Britain-Guatemala*).

⁶ Ibid., No. 194 (*France-Great Britain*).

to determine 'all that fairly belongs to the Kingdom of Sokoto'.¹ The Arbitrators of the Chaco boundary between Bolivia and Peru were authorized to determine it '*ex aequo et bono*' and were, in particular, required to take account of '... the experience accumulated by the Peace Conference and the advice of the military Advisers to that organization'.²

Although the terms 'political and State interests', 'necessity and convenience', and 'equity' are broad and relatively undefined, it may be assumed that they are roughly synonymous and include the historical, possessory, ethnographical, social, economic, geographical and strategic criteria which are, on occasion, set out more explicitly.³ Admittedly these agreements only identify relevant criteria; they provide no hierarchy of priorities for their application—and obviously each criterion might dictate a different boundary.

A further source of guidance may be found in decisions taken by other organs of dispute settlement: in the context of the settlement of territorial disputes decisions of post-war peace conferences and institutions fulfilling a similar function are of particular interest. Once it is recognized that international judicial tribunals do perform some quasi-legislative tasks (even if only *ad hoc* and limited in scope) it should not cause surprise if they employ criteria similar to those employed by non-judicial bodies. A typical example of the latter is offered by the reasoning of the United Nations General Assembly Resolution on the disposal of the former Italian territory of Eritrea. This runs as follows:

Taking into consideration

(a) The wishes and welfare of the inhabitants of Eritrea, including the views of the various racial, religious and political groups of the provinces of the territory and the capacity of the people for self-government,

(b) The interests of peace and security in East Africa,

(c) The rights and claims of Ethiopia based on geographical, historical, ethnic or economic reasons, including in particular Ethiopia's legitimate need for adequate access to the sea,

Taking into account the importance of assuring the continuing collaboration of the foreign communities in the economic development of Eritrea,

Recognizing that the disposal of Eritrea should be based on its close political and economic association with Ethiopia, and

Desiring that this association assure to the inhabitants of Eritrea the fullest respect and safeguards for their institutions, traditions, religions and languages, as well as the widest possible measure of self-government, while at the same time respecting the Constitution, institutions, traditions and the international status and identity of the Empire of Ethiopia, . . . ⁴.

¹ Ibid., No. 163 (*France-Great Britain*); this was concerned with the delimitation of 'spheres of influence'.

² Ibid., No. 407.

³ Cf. the Advisory Opinion on the *Jaworzina Boundary*, *P.C.I.J.*, Series B, No. 8, pp. 39-40.

⁴ Whiteman, *Digest*, vol. 3, p. 21. See also the decisions referred to above, p. 7 n. 4.

The Resolution goes on to recommend a complex regime for the territory: it is unlikely that a judicial tribunal would be required to do that. But the essential considerations outlined—the ‘wishes and welfare of the inhabitants’, the regional ‘interests of peace and security’, and the ‘geographical, historical, ethnic or economic’ links of the territory—are amongst those referred to in the bilateral agreements analysed above. It will, indeed, appear from the examination of arbitral awards and judicial decisions in the following pages that these are the criteria adopted to resolve the fairly small-scale disputes referred to judicial tribunals.

These awards are discussed below under three headings: the attribution of sovereignty over land areas, sea areas, and areas *sui generis* (the Rann of Kutch and the North Sea Continental Shelf are examples of the latter). This is partly a classification of convenience; in part, however, it is a classification of substance—the customary international law of land and sea areas is generally supposed to differ, and areas such as uninhabited salt marsh, or submerged land, do not fit neatly into either category. In a concluding section the criteria applied by tribunals are summarized; an attempt is made to range them in a hierarchy of priorities; and the status of these criteria as international law, and the powers of tribunals to apply them, are considered.

II. THE ATTRIBUTION OF SOVEREIGNTY OVER LAND AREAS BY JUDICIAL AND ARBITRAL TRIBUNALS

In this century there have been more than twenty-five judicial and arbitral awards relating to land territory. The awards analysed in detail here are therefore only a selection. The representative character of this sample may be tested against the characteristics of the total number of awards. First, the majority were rendered by arbitral tribunals. The International Court has been concerned with only seven.¹ Secondly, the majority of awards relate to the course of a boundary: only four relate to isolated pieces of territory—*islands*. These latter are among the best known²—perhaps misleadingly, since they can be of only rare occurrence in modern conditions, and, normally, would relate to areas of only trivial value. In consequence there is perhaps a tendency to regard the law relating to the acquisition and loss of territory as of little significance today. The traditional notions—of ‘effective occupation’ etc—and the old categories of *res nullius* and *res communis* are found inappropriate or unhelpful in the

¹ Two of these were Advisory Opinions given to the Council of the League of Nations on the legal effect of decisions taken by the Conference of Ambassadors (the *Jaworzina Boundary*, P.C.I.J., Series B, No. 8, and the *Monastery of Saint-Naoum*, *ibid.*, No. 9).

² *Clipperton Island* (R.I.A.A., vol. 2, p. 1105); *Island of Palmas* (*ibid.*, p. 829); *Eastern Greenland* (P.C.I.J., Series A/B, No. 53, p. 22); the *Minquiers and Ecrehos* (I.C.J. Reports, 1953, p. 47).

solution of the problems raised by the ocean bed and continental shelf, polar regions and outer space. It may, however, be that more useful guidance is to be found in boundary awards. Boundary disputes are still of considerable frequency and importance, and, it will be suggested below, the criteria applied by tribunals to resolve boundary disputes may be found to be of more value in the resolution of modern territorial problems than are some more traditional formulations. The lucid exposition of the law on the acquisition of territory given by Max Huber in his *Island of Palmas* award has formed the basis of subsequent theoretical discussions;¹ but he did not draw on the considerable jurisprudence of tribunals adjudicating boundary disputes, and to that extent his award is an incomplete exposition of the law.

A third point worth noting is that the majority of awards relate to South and Central America: naturally enough, considering the problems of boundary delimitation and the tradition of arbitral settlement of the States of that region. These awards concerned the application of the *uti possidetis* principle to disputes between American States, and also disputes between the independent American States and their colonist neighbours.

Five boundary awards are examined here: the *Cordillera of the Andes Boundary* award (1902) concerns the interpretation of a treaty; the *Argentine–Chile Frontier* award (1966) interpreted a part of the 1902 award; the *Honduras–Nicaragua Boundary* award (1906) concerned the application of the *uti possidetis* principle, and also applied considerations of ‘equity’; the judgment of the International Court on the *Arbitral Award of the King of Spain* (1960) concerned the validity of the 1906 award, including the power of the Arbitrator to apply equitable considerations; the *Honduras Borders* award (1933) concerned the application of the *uti possidetis* principle, and considered in some detail the application of supplementary criteria. The *Island of Palmas* award is included for comparison.

By way of preface, it should be noted that all the boundary awards afford a compromise between the claims of the parties. This may be regarded as evidencing a diplomatic desire to give some satisfaction, and to ensure that the award is acceptable to both parties; or it may be the result of taking into consideration all the interests argued by the parties—clearly these will rarely weigh in favour of one party alone. All these cases concern inhabited areas. In consequence, perhaps, greater regard is paid to the wishes and welfare of the inhabitants than traditional expositions of international law would admit. Generally, the customary and conventional international law which the arbitrators were directed to apply were found inadequate or even non-existent. The tribunals, however, showed concern to establish sound, practical solutions within the limits of the parties’ respective claims.

¹ See, e.g., Jennings, *op. cit.* (above, p. 20 n. 2).

*Cordillera of the Andes Boundary case (Argentina v. Chile)*¹

This dispute between Argentina and Chile concerned the course of the boundary between the two countries in the Cordillera of the Andes south of latitude 26° 52' 45". In 1856 the two parties had acknowledged by treaty as the boundaries between their respective territories the line of *uti possidetis* in 1810.² In 1881 a boundary treaty defined the boundary in greater detail; it provided as follows:

The boundary between Chile and the Argentine Republic is from north to south, so far as the 52nd parallel of latitude, the Cordillera de los Andes. The boundary-line shall run in that extent over the highest summits of the said Cordillera which divide the waters, and shall pass between the sources (of streams) flowing down to either side.³

This treaty also provided that difficulties in its application should be solved amicably by a mixed commission of experts appointed by the respective Governments. In view of the difficulties which the experts had experienced in reaching agreement on the application of the 1881 treaty, a Protocol of 1893 reaffirmed that the Experts should hold the principle set out in the provision quoted above 'as the invariable rule in their proceedings'.⁴ The Protocol drew the following conclusions from this principle:

Consequently, there shall be held as perpetually belonging to the Argentine Republic and as under its absolute dominion all the lands and waters, . . . lying to the east of the line of the highest summits of the Cordillera de los Andes which divide the waters; and, as the property and under the absolute dominion of Chile, all the lands and all the waters, . . . lying to the west of the highest summits of the Cordillera de los Andes which divide the waters.⁵

In 1896 the parties reaffirmed, by another treaty,⁶ that the expert commissions demarcating the frontier should apply the provisions of the treaty of 1881 and the protocol of 1893. They further provided that disputes relating to the region to the south of parallel 26° 52' 45", should, in default of prior amicable settlement between the two Governments, be referred to the arbitration of the British Government. The Arbitrator was to appoint a Commission to survey the disputed territory, and to pronounce an award in accordance with 'the strict application . . . of the provisions of the said Treaty and Protocol'.⁷ In November 1898 Argentina and Chile formally submitted a dispute with respect to four sections of the boundary to Queen Victoria as Arbitrator. By a Protocol of 28 May 1902,⁸ both countries invited the Arbitrator to appoint a Commission to fix on the ground the

¹ 1902. Award in *R.I.A.A.*, vol. 9, p. 31.

² *British and Foreign State Papers*, vol. 49, p. 1200.

³ *Ibid.*, vol. 72, p. 1103; also *R.I.A.A.*, vol. 9, p. 45.

⁵ Article 1.

⁶ *British and Foreign State Papers*, vol. 88, p. 553; also in *R.I.A.A.*, vol. 9, p. 35.

⁷ Art. II.

⁸ *British and Foreign State Papers*, vol. 95, p. 764.

⁴ See *ibid.*, p. 46.

boundary to be determined by the award. The Arbitration Tribunal set up to examine the dispute reported on 19 November 1902, and the award was made on the following day by King Edward VII.¹

The dispute between the parties concerned the interpretation of the boundary treaty and protocol and their application to the ground in certain parts of the Andes. In the northern, and at the time that treaty had been drawn up the best explored part of the frontier, the crest-line of the Cordillera and the continental water divide (separating the rivers flowing into the Atlantic from those flowing into the Pacific) coincided. In the south, which had at that date been little explored, the Cordilleras were broken by transverse valleys, and in consequence the crest-line and the continental water-divide line did not coincide. In these circumstances, the parties differed as to the correct interpretation and application of the boundary agreement: naturally, each party claimed the line more favourable to it. Argentina claimed the line of 'the highest summits of the Cordilleras . . .'; Chile claimed the continental water-divide.²

The award does not state the principles upon which it is based; it simply lays down a line in the disputed sectors. It is, however, evident from the description of the line that it follows no such straightforward principle as either line contended for by the parties. The Report of the Tribunal of Arbitration,³ annexed to the award, throws more light on the reasoning behind it. It notes the conflicting contentions of the parties,⁴ and the geography of the disputed area,⁵ and goes on to observe:

In short, the orographical and hydrographical lines are frequently irreconcilable; neither fully conforms to the spirit of the Agreements which we are called upon to interpret. It has been made clear by the investigation carried out by our Technical Commission that the terms of the Treaty and Protocols are inapplicable to the geographical conditions of the country to which they refer. We are unanimous in considering the wording of the Agreements as ambiguous, and susceptible of the diverse and antagonistic interpretations placed upon them by the Representatives of the two Republics.

Confronted by these divergent contentions we have, after the most careful consideration, concluded that the question submitted to us is not simply that of deciding which of the two alternative lines is right or wrong, but rather to determine—within the limits defined by the extreme claims on both sides—the precise boundary-line which, in our opinion, would best interpret the intention of the diplomatic instruments submitted to our consideration.

We have abstained, therefore, from pronouncing judgement upon the respective contentions which have been laid before us . . . and we confine ourselves to the pronouncement of our opinions and recommendations on the delimitation of the boundary . . .⁶.

¹ *R.I.A.A.*, vol. 9, p. 37.

² Report of the Tribunal, § 10 (*ibid.*, pp. 39–40). For a discussion of the problems and a description of the disputed area see Holdich, *The Countries of the King's Award*.

³ *R.I.A.A.*, vol. 9, p. 39.

⁴ Report, § 10, *ibid.*, p. 40.

⁵ *Ibid.*

⁶ *Ibid.*, §§ 15–17, pp. 40–1.

The Report then describes the line recommended in the four sectors in dispute; the award reproduces this description in rather less detail.

Although it appears from the passage from the Report quoted above that the boundary described in the award and the Report represents a compromise between the opposing claims of the parties, neither the award nor the Reports provide any clue as to the specific considerations which determined the particular form which the compromise line took.

Considerable light is cast on this problem by certain documents of the Tribunal and of the Commission appointed by it to inspect the disputed area on the spot. The chief architect of the boundary set out in the Report and award seems to have been Sir Thomas Holdich, a geographer, who was both a member of the Tribunal of Arbitration and of the Commission appointed by the Tribunal to survey the disputed area. Holdich's report to the Tribunal on his inspection of the area, and his draft definition of the boundary prepared for the Tribunal,¹ throw light on the considerations which prompted the Tribunal's recommendation of the line described in the award.

In particular, the preparatory documents reveal the following facts:

(1) The possibility of a compromise of the opposing claims was discussed with Argentine and Chilean officials when the Commission visited the disputed area.²

(2) The need for some compromise solution was dictated by the geography of the disputed area. For in this southern area there was no continuous chain of highest peaks, such as that of the northern Andes; a north-south line drawn through them would descend frequently almost to sea-level. The continental divide claimed by Chile as the boundary was equally incompatible with the provisions of the treaty, for in parts the absence of any marked ridge coinciding with it made it 'a boundary of the plains and not of the mountains'.³ Therefore, Holdich concluded that: '... both lines deflect seriously from these geographical conditions which are aimed at by the treaties; and, further, that no line can be indicated which will, in all respects, fulfil those conditions'.⁴ Consequently, in Holdich's view, a compromise was the only reasonable solution.⁵

(3) The terms of the treaties pointed to a particular compromise which would fulfil the intentions of the parties to the treaties. In Holdich's view,

¹ These documents were printed as annexes to the Argentine and to the Chilean Memorials in the *Argentine-Chile Frontier* case (1966). Further comments by Holdich on the boundary are to be found in his *The Countries of the King's Award and Political Frontiers and Boundary Making*.

² Holdich, 'Narrative Report' on the visit of the Commission, *Chilean Memorial*, p. 54.

³ Holdich, 'Summary of Conclusions', *ibid.*, p. 103.

⁴ *Ibid.*

⁵ Holdich, 'Conditions other than Geographical', *ibid.*, p. 106: 'The consideration of the geographical conditions, or physical configuration, of the area in dispute, therefore, points to a compromise as the only reasonable solution of the difficult problem of the boundary, and it seems to me that the reconcilable nature of the terms of the treaties and of the protocols themselves points to the same conclusion.'

the terms of the treaties suggested that both parties at the time they concluded the treaties contemplated a similar geographical structure along the whole length of the boundary; that is, in the south, as well as in the north, they assumed that the main chain of highest elevation would coincide generally with the continental divide. Thus, Holdich considered, 'the boundary ideal on both sides was practically identical, i.e. a main meridional chain of highest peaks possessing continuity as a water divide'.¹ Since no such chain existed, Holdich concluded:

... we are therefore forced as much by the interpretation of the treaties themselves as by the structural disposition of ranges and valleys into a boundary of compromise which shall combine as far as possible the conditions of an elevated watershed with geographical continuity.²

(4) The general lines of the compromise which followed from the attempt to reconcile the intentions of the parties with the geography of the area and the requirements of a geographically satisfactory boundary were themselves modified by certain non-geographical considerations. These were set out by Holdich in the following terms:

There are ... certain conditions which cannot be overlooked in defining the position of an international boundary such as this, which may be found to militate against the idea of a central meridional dividing line. These are :—

- (1) the value of the property to be divided
 - (2) present occupation
- and (3) strategic considerations.³

¹ Ibid.

² Ibid.

³ Ibid. In this document Holdich went on to particularize how these considerations had governed his proposal. *Inter alia*, he noted that there were few areas of value in the disputed territory, i.e. areas which were available for stock raising or agriculture. And also that ... 'the chief prospective wealth of these tracts so far as it can be derived from the land surface is concentrated on or near the continental divide which represents the line of division claimed by Chile. ... On either side, east and west, the pampas and mesetas of Argentina equally with the mountain slopes of the Andes are of less productive value. The cultivated or cultivable areas of the Patagonian plains are exceedingly narrow and the whole country is subject to excessive climatic vicissitudes. The Andine mountains on the other hand, are pervaded by an atmosphere of excessive humidity and the valleys are scoured by floods. It is about the outermost of the eastern ridges of the Andes that nearly all the valuable tracts are concentrated, and this fact renders it exceedingly difficult to define an equitable division of property (based on any assumption of economic productiveness), which can be represented by a central line. But again, the central line of continuous watershed which now divides Chile and Argentina to the north of the disputed area is subject to exactly the same conditions of inequality as to the value of the divided property, nearly all the best land lying on the Argentine side of it. Thus it would appear that if the original treaty-makers contemplated a central line of division, they were prepared to accept a partition that would favour Argentina' (ibid., pp. 107-8).

With respect to the question of giving effect to occupation of territory by nationals of either party, he said: 'So far as the present occupation of the land is concerned, I am of opinion that the conditions under which that occupation has been effected are of so elastic and loose a nature that it is only where considerable communities (such as exist only in the 16th October Colony, and in the Ultima Esperanza region) are distinctly affiliated by race and tradition, or by natural facility of intercourse, with either one Republic or the other, that the Tribunal need be concerned with the claims to which it would give rise. Individual claims, such as may be advanced by

In the introduction to the draft definition of the boundary which he proposed to the Tribunal, Holdich summarized the manner in which he had attempted to give effect to these considerations:

In effecting a compromise, therefore, I should propose to assign to Chile all that is possible towards such a proportion of territory as will be of equal value with that retained by Argentina, respecting to the utmost the claims of all colonists or settlers who are affiliated with the Chilean Government. Strategic considerations, as well as those referring to occupation point to only one way in which anything like a satisfactory compromise of this nature can be effected, and that is, shortly, to assign to Chile as much as possible in the southern districts and to leave to Argentina lands which she has effectively occupied in the north. In other words, to allow Chile to retain possession of the grass uplands and forests of the regions about Ultima Esperanza and to assign to Argentina the valleys of 'the 16th of October' and Cholila. These are the two districts which are of really serious importance as possessing the greatest facilities for economic development and it is fortunate that the great mass of Chilean or of Argentine colonization within the disputed area gravitates towards these two districts respectively. Beyond these two districts there are others of minor importance amongst which an equal distribution of value will be attempted but the adjustment of the line as a whole should be regarded as being framed in these two most important features of it.¹

The following points regarding the authority of the tribunal and the considerations of which it took account in determining the course of the boundary are worthy of note.

(1) The tribunal was required by the terms of the *compromis* to apply strictly the provisions of the boundary treaties between the parties. It did not do so, because the geography of the area did not permit the drawing of a boundary line in accordance with the verbal description in the treaties. Faced with this difficulty, the tribunal might have adopted a number of different courses. It might have adopted the view that its authority was limited to applying the provisions of the treaties, and since it could not do

isolated occupants of the remoter valleys will invariably be found to possess no solid legal basis. Frequently such occupation is simply that of the squatter who has made no agreement with either government. In other cases the terms of occupation are provisional and the settlers prepared for any eventuality. This is indeed the case more or less throughout the disputed area but still I think that it will certainly ensure a more satisfactory adjustment of the boundary and acceptance of the decision of the Tribunal if as far as possible the districts which are held by colonists with distinctly Argentine or Chilean derivation should be awarded to Argentina or to Chile as the case may be' (*ibid.*, p. 109).

On 16 October Colony, see particularly Holdich's comment in *Political Frontiers and Boundary Making*, pp. 46-50. The effect of strategical considerations on the course of the boundary was put by Holdich in the following terms: 'Strategically considered, the boundary should be, as far as possible a solid barrier to interference on either side. Indeed, the only expression of opinion on the subject of the boundary which I have heard strongly advanced on both sides is the necessity for a formidable natural barrier which may prove a physical obstacle to aggression. This is, however, opposed altogether to the theory of the continental divide as the dividing line, and certainly tends to throw the boundary westward into the mountains (rugged and impassable, although they contain no continuous main chain of water-parting) of the Western Cordillera' (*Chilean Memorial*, pp. 109-10). In general, these views are in accordance with the principles of boundary-making espoused by Holdich in *Political Frontiers and Boundary Making*.

¹ *Chilean Memorial*, p. 111.

so, it must pronounce a *non liquet*.¹ Or it might have made *recommendations* to the parties as to the desirable course of the boundary. Alternatively, the tribunal might have held that the treaty had effectively determined the course of the boundary (and was not partially void) in the disputed sector, although in ambiguous terms; and that the tribunal must therefore give some authoritative interpretation of it. Such an interpretation might have been the adoption of either of the lines claimed by the parties, or a new line selected by the court, and claimed to correspond best to the intention of the parties. In fact, the Tribunal adopted this latter approach with certain modifications. It informally sought assurance that a 'compromise' decision would be acceptable, and, having that assurance, determined on a line which would fulfil certain conditions. In particular, it would attempt to give effect to the fundamental aims of the parties as to the form of the boundary; it would reconcile as far as possible the conflicting interpretations offered by the parties; and it would take account of the general requirements of good, practical boundary making, and of the various interests of the parties in the boundary area.

(2) The tribunal derived little assistance from the principles or rules of international law. Rules relating to the interpretation of documents or to the acquisition of territory were not mentioned. The only special rules of international law—the boundary treaties—were found to be ambiguous and their terms inapplicable. The tribunal did, however, apply certain criteria to drawing the boundary. It should be a compromise, it should correspond as far as the geography of the area admitted to 'the boundary ideal on both sides'. The general line following from these two criteria should be modified by certain other considerations: an equal distribution in value of the disputed territory; the interests and allegiance of nationals of either party who had occupied the area; and the advantage of a good strategic boundary. The parties accepted the award, and acquiesced in both the scope of the discretion exercised by the tribunal and in the criteria on which the award was based.

*Argentine–Chile Frontier case*²

This case concerned the interpretation of a part of the 1902 award and its application to the ground in a small stretch of the frontier. The area covered by the 1902 award was largely unexplored. Consequently, although

¹ This view was taken by Alvarez (in *Revue générale de droit international public*, 10 (1903), p. 651): he considered that the award was *ultra vires*. See also Carlston, *op. cit.* (above, p. 3 n. 4), pp. 95 et seq. Cf. Politis, *La Justice internationale*, pp. 62–70, for the view that it was only mandatory to apply the treaty if inspection on the spot (also authorized by the *compromis*) showed that it *could* be applied. If not the tribunal could determine the boundary according to the intention of the treaty—which decision would be binding on the parties if they accepted it, although perhaps technically *ultra vires*.

² 1966. Award published by H.M.S.O. and in *International Law Reports*, vol. 38, p. 10.

the Tribunal in 1902 was supplied with maps of the territory, and these were to some extent checked on the spot by the Commission, the maps upon which the Tribunal based its award and described the award line were not in all respects accurate. A Demarcation Commission appointed by the Arbitrator¹ demarcated the boundary in this disputed sector, but did not follow the entire course of the boundary described in the award and therefore did not realize that the award map was in part erroneous.

The relevant portion of the description of the line of the boundary in the 1902 award is as follows:

From the fixed point on the River Palena, the boundary shall follow the River Encuentro to the peak called Virgen, and thence to the line which We have fixed crossing Lake General Paz.²

The award provided that it should be read with the Report of the Tribunal of Arbitration and the map upon which the line of the boundary was drawn.³ The more detailed description of the boundary line in the Report was in the following terms:

. . . it shall follow the lofty water-parting separating the upper basins of the Fetaleufu and of the Palena . . . above a point in longitude $71^{\circ} 47' W$, from the lower basins of the same rivers . . .

Crossing then Palena at this point, opposite the junction of the River Encuentro, it shall then follow the Encuentro along the course of its western branch to its source on the western slopes of Cerro Virgen. Ascending to that peak, it shall then follow the local water-parting southwards to the northern shore of Lago General Paz at a point where the Lake narrows, in longitude $71^{\circ} 41' 30'' W$.

The award map depicted the line described in the Report and the award, and, in particular, depicted a river, named the Encuentro, with a course generally southerly and a western branch originating on the western slopes of a mountain, named Cerro Virgen.

The Demarcation Commission in 1903 erected Boundary Post 17 on the northern shore of Lake General Paz. This gave rise to no dispute. Boundary Post 16 was erected opposite the mouth of a river now known as the Encuentro. This river did not, however, have a source on the Cerro Virgen: indeed, some way above its mouth it divided into two channels, one flowing from the east (and a source in a range of mountains considerably to the east of its mouth) and the other flowing from the south or west (and a source not too far from Cerro Virgen at a point subsequently described as

¹ At the request of the Argentine and Chilean Governments by a Protocol of 28 May 1902, *British and Foreign State Papers*, vol. 95, p. 764.

² Art. III, § 2.

³ Art. V: 'A more detailed definition of the line of frontier will be found in the Report submitted to Us by Our Tribunal, and upon the maps furnished by the experts of the Republics of Argentina and Chile, upon which the boundary which We have decided upon has been delineated by the members of Our Tribunal and approved by Us.'

Portezuelo de las Raíces).¹ The water-parting from Cerro Virgen to Boundary Post 17 did in fact exist. The problem remained a potential, and mainly dormant, dispute for more than half a century. Finally, in 1964, the dispute was referred to the Arbitration of the British Crown.²

The Compromiso formulated the question for the Court of Arbitration in the following terms:

To the extent, if any, that the course of the boundary between the territories of the Parties in the Sector between boundary posts 16 and 17 has remained unsettled since the 1902 Award, what, on the proper interpretation and fulfilment of that Award, is the course of the boundary in that Sector?

It was further provided that:

The Court of Arbitration shall reach its conclusions in accordance with the principles of international law.³

The Parties agreed that the 1903 Demarcation and, in particular, the placing of Boundary Posts 16 and 17, was binding on them; therefore, the line of the boundary in the area in dispute must link those two posts. They agreed, also, that the boundary must follow the River Encuentro. Their contentions concurred, therefore, from the mouth of the Encuentro to a point which formed the confluence of two channels of that river. From this point, the claims of the parties diverged. Chile contended that the eastern channel must be followed to its source; Argentina contended that the southern (or western) channel must be followed to its source, at the place where that had been designated by the Mixed Boundaries Commission. Neither of these channels originated on the Cerro Virgen, which both parties were agreed had been correctly described and located in the award and which could be easily identified on the ground. Both parties contended, however, that their claims were, in so far as the geography of the area permitted, applications of the award conforming as closely as possible to its terms. Argentina contended that its claim corresponded best to the actual wording of the Report and award, and the general line of the boundary shown on the Award Map. In particular, the Argentine line passed through the Cerro Virgen which was expressly mentioned as a point on the boundary in the award, and followed the water-parting from that peak to Boundary Post 17, as the award described. Furthermore, Argentina contended that the award required that the boundary follow the major channel of the Encuentro to its source, and, on grounds of geographical and geological characteristics, and the history of river nomenclature in the area,

¹ For a description of the geography of the area, see *Report of the Court of Arbitration*, pp. 40-54.

² The historical development of the dispute between 1903 and 1964 is recounted *ibid.*, pp. 55-64.

³ Agreement (Compromiso), Art. I, *ibid.*, p. 14.

that the southern (or western) channel was, in fact, the major channel. Argentina also relied on the proposal of the Mixed Boundary Commission as being in part binding (in the sector unanimously approved), and, as a whole, authoritative (especially in the sector *recommended*). Various acts (including maps—especially a map of 1952 which showed the boundary as very similar to the line claimed by Argentina) of the Chilean Government were alleged to constitute acquiescence in the Argentine claim, and to estop the Chilean Government from making its present claim.

Chile conceded that its claim did not comply entirely with the wording of the award, but contended that it applied the intention behind the award best to the geography of the area as it was now known to be. Chile placed great reliance on the reports and draft description of the award line made by Sir Thomas Holdich as evidence of the intention behind the terms of the award. In particular, Chile emphasized the express general intention to describe a line ‘. . . which shall combine as far as possible the conditions of an elevated watershed with geographical continuity’.¹ Chile also considered that implied in the terms of the award as a whole was the principle of maintaining the unity of river basins. Chile contended that its claim constituted the best application to the terrain of these principles, and the one which the Tribunal, had it known the true geography of the area, would have selected. Chile also contended that the eastern channel of the Encuentro was the major channel on geographical grounds.² Argentine acquiescence in the Chilean claim was also asserted, and it was further argued that Argentina was estopped by various statements from putting forward its present claim.

An important feature of the Chilean case was the evidence of immigration into the disputed area of Chilean settlers since the date of the award. In 1902 the disputed sector had been uninhabited; immigration into the area began in 1910, and at the date of the present proceedings the northern part of the disputed sector contained a thriving community of Chilean affiliations. This community extended on both sides of the southern (or western) channel of the Encuentro, up to the eastern channel. Thus the boundary claimed by Argentina would split this community. Both parties asserted various acts of administration of the area. It appeared, however, that at least since 1927, the main contacts of the inhabitants of the area had been with Chile; the nearest town, Palena, had been founded in undisputedly Chilean territory at that date. Its gradually developing services for marketing, communications, registry of property, births, marriages and deaths, etc. had thenceforward been used in preference to the more distant Argentine centre. Chile contended that this evidence should be taken account

¹ See above, pp. 30 et seq.

² See submissions of the parties, *Report of the Court of Arbitration*, pp. 20–36.

of by the Court on two major grounds: as evidence of the 'fulfilment' of the 1902 award by the parties; and as a consideration influencing the exercise of any discretion to 'fulfil' the 1902 award which had been granted to the Court by the parties. No title by occupation or prescription independent of the award was asserted, apparently on the basis that the status of *territorium nullius* was excluded by the treaties preceding the 1902 award, and reliance on prescription would presuppose that the territory properly belonged (under the treaties and/or the 1902 award) to the other party. This conceptual dilemma illustrates the problems raised by the failure of customary international law (in theory) to admit the validity of evidence of *administration* of territory except under the rubric of 'occupation' or 'prescription'. These categories simply cannot be applied to factual and legal situations as ambivalent as they were in this case; but, equally clearly, such evidence is relevant—the difficulty is to find an appropriate legal category for it.

The diagram appended to the award shows that the line determined by the Court of Arbitration was—in the broadest sense—a compromise between the claims of the two parties. The reasoning of the Court's Report provides a partial, but incomplete, explanation of the precise course of the line. In brief, the Court's approach was as follows.

First, the Court emphasized that it was required to reach its conclusions in accordance with the principles of international law; and that it was not authorized to apply any special rules or decide in the character of a friendly mediator.¹

Second, the Court interpreted the question put to it as falling into two parts:

The first point is: to what extent, if any, has the course of the boundary between the territories of the Parties in the sector between Boundary Posts 16 and 17 remained unsettled since the Award of 1902? The second point is: what, on the proper interpretation and fulfilment of that Award, is the course of the boundary in that sector?²

In the view of the Court, this first point was a preliminary point, in the sense that before determining the course of the boundary 'on the proper interpretation and fulfilment of [the 1902] award', it must first determine the extent to which that award had settled the course of the boundary—if at all.³ Both Parties had, in their respective pleadings, treated this first point as itself raising a question of interpretation, to be resolved by the principles of interpretation of legal documents, e.g. investigation of the intentions of the Arbitrator by reference to the terms of the award, its context, preparatory documents, etc., and to some extent by reference to 'subsequent

¹ *Report of the Court of Arbitration*, p. 65.

² *Ibid.*

³ *Ibid.*, p. 66.

practice', its interpretation and application by the parties to it.¹ The Court did not treat this first point as requiring the application of the usual principles of interpretation. It applied, instead, a concept akin rather to that of impossibility of performance or frustration, enunciating the following general rule:

Since the 1902 award was a valid award, it must be assumed to have settled the entire boundary between Argentina and Chile in the area covered by it—including the boundary between Boundary Posts 16 and 17—except to the extent to which it is impossible to apply the Award to the ground. In other words, the decision as to what part of the boundary between Boundary Posts 16 and 17 remained unsettled after the award and the demarcation is the same as the decision as to what is the part of the boundary in that sector in which the 1902 award cannot be applied to the ground.²

From the application of this rule, the Court concluded that the 1902 award had settled the course of the boundary between Boundary Post 16 and the Confluence, and between Cerro Virgen and Boundary Post 17:

... the Court has identified on the ground most of the features named in the award. It finds no difficulty in applying the award to the ground in the parts of the sector between Boundary Post 16 and the Confluence and between Cerro de la Virgen and Boundary Post 17. The Court therefore accepts Argentina's Submissions that the Award, taken together with the demarcation of 1903, settled the boundary between Boundary Post 16 and the Confluence and also between Cerro de la Virgen and Boundary Post 17.³

The Court was prepared to admit the possibility that

... parts of the boundary thus found to have been settled in 1902-03 became unsettled since that time or became settled in a different way.⁴

But it found no conclusive evidence of this. The Court treated the Chilean evidence of immigration to the area by Chilean settlers and Chilean administration as relevant to this question but found that

... taken as a whole, the evidence is just what one would expect in any disputed zone. It shows settlers not surprisingly turning to the authorities of both countries in case of need and doing their best to keep on good terms with both sides. The evidence is quite insufficient to establish any abandonment by Argentina of her rights under the 1902 award or any acquisition of title by Chile through adverse possession of territory adjacent to those parts of the boundary line settled in 1902-03. No more, in the Court's view, does the evidence establish that the parts of the line remaining unsettled in 1903 have subsequently become settled in the sense now contended for by Chile.⁵

Nor did the Court find any conclusive evidence of an implied or tacit agreement between the parties as to the course of the boundary, or that either party was estopped from putting forward its claim.⁶

¹ See, e.g., *Argentine Memorial*, pp. 201 et seq., *Counter-Memorial*, pp. 69 et seq.; *Chilean Memorial*, pp. 98 et seq., *Counter Memorial*, pp. 27 et seq.

² *Report of the Court of Arbitration*, p. 70.

³ *Ibid.*, p. 72.

⁴ *Ibid.*, p. 75.

⁵ *Ibid.*, p. 76.

⁶ *Ibid.*

The Court next turned to the second part of the question:

What, on the proper interpretation and fulfilment of the 1902 award, is the course of the boundary in the unsettled part of the sector, *i.e.*, the part between the Confluence and Cerro de la Virgen.¹

The principles of interpretation to be applied to the 1902 award had been discussed at length by the parties, and their arguments are referred to in the Report. In the main, they assumed that the goal of interpretation was to ascertain the Arbitrator's intention; and in this sense, the Court derived little assistance from them. It said:

But with regard to the 1902 award, the Court is satisfied that, in order to determine the intention of the Arbitrator, it is not necessary to look outside the three documents of which the award consists, namely, the Award itself and the Report and Maps referred to in Article V of the award. It is not so much a question of the Arbitrator's intention as of that intention being frustrated by an incorrect appreciation of the geography.²

The extent of the authority of the Court to interpret and to 'fulfil' the 1902 award was also extensively debated by the parties. Both parties were agreed that, either implied in the task of interpretation (as Chile preferred) or explicit in the reference to 'fulfilment' in the *Compromiso* (as Argentina preferred), a certain discretion was conferred on the Court at least to take account of geographical factors in drawing a workable boundary. Chile contended that social and economic factors—the Chilean community in the Encuentro valley—should be taken account of also and that primarily 'fulfilment' referred to subsequent acts of the parties.³ This was strongly contested by Argentina.⁴ The Court interpreted the extent of its authority under the *Compromiso* in the following terms:

The Court believes this phrase to be the equivalent of 'interpretation and application' which appears in many compromissory clauses. The addition of the word 'application' ('fulfilment') is due to the desire of Parties to get disputes finally settled, which might not otherwise be the case if the tribunal authorised to decide the dispute were empowered to interpret only. Particularly is this true of boundary disputes, where questions of demarcation as well as delimitation are involved. The Court considers therefore that the phrase 'interpretation and fulfilment' is a comprehensive expression which authorises it to examine the demarcation of 1903 as well as the 1902 Award itself, and also authorises, nay requires, the Court, while avoiding any revision or modification of the 1902 award, nevertheless to supply any deficiencies therein in a manner consistent as far as possible with the Arbitrator's intention.⁵

The Court then formulated two principles to guide it in determining the precise course of the boundary from the confluence to Cerro Virgen:

The first is the general principle that where an instrument (for example, a treaty or an award) has laid down that a boundary must follow a river, and that river divides

¹ *Ibid.*, p. 77.

² *Ibid.*

³ See, e.g., Chilean final submissions Nos. (24)–(27), *Report of the Court of Arbitration*, pp. 31–2.

⁴ See, e.g., Argentine final submission No. (13), *ibid.*, p. 27.

⁵ *Ibid.*, p. 78.

into two or more channels, and nothing is specified in that instrument as to which channel the boundary shall follow, the boundary must normally follow the major channel. The question which is the major channel is a geographical question . . .

The second principle governing the Court in its approach to the problem now before it is that, whichever channel is followed—and this must normally be the major channel—the Court must never lose sight of the fact that it was the intention of the Arbitrator to make the boundary follow a river as far as Cerro de la Virgen.¹

It will be noted that this second principle is less a principle of interpretation than a recognition that the Court had already decided that the Cerro Virgen–Boundary Post 17 sector had been settled. Consequently, somehow the line of the boundary must, for purely practical reasons, arrive at Cerro Virgen.

The Court determined that the eastern channel was the major channel of the Encuentro on ‘historical and scientific grounds’.² The historical evidence relied on included the opinion of an Argentine surveyor in 1907, the statement in the Argentine Memorandum sent to the Chilean Ministry of Foreign Affairs in 1913, and a Report made by a Technical Adviser to the Argentine Ministry for Foreign Affairs and Worship in 1941.³ The scientific evidence was more cogent: in the Court’s opinion ‘. . . the three principal criteria to be applied . . . are length, size of drainage area, and discharge, preferably in terms of annual volume’.⁴ The application of these three criteria were all in favour of the eastern channel as the major channel. Argentina, on the other hand, had laid stress on the geological history of the area, and, in particular, on the lineal continuity of the southern channel and its containing valley with the lower reaches of the Encuentro. The Court, however, attached ‘. . . more importance to the continuity of the general force of the river with that of the trunk stream and regards this as more apparent in the case of the Eastern Channel’.⁵

Mindful of the need for the boundary to arrive at Cerro de la Virgen, the Court decided that it was unnecessary that the boundary follow the major channel of the Encuentro to its source. Both parties had contended that it must do so, in order to conform with the description of the boundary in the 1902 Report. The Court, however, applied a broad principle of frustration as an effect of the geographical error under which the 1902 Tribunal had laboured. It put this concept in the following terms:

In the view of the Court, . . . the notion of following the Encuentro to its source is inextricably bound up with the erroneous idea that that river has a western branch the source of which is on the western slopes of Cerro de la Virgen. . . . The river which has its source on the western slopes of Cerro de la Virgen is not the Encuentro but the Salto/Azul or a tributary thereof . . . Given this error, and given also the fact that the reference in the Report of the Tribunal of 1902 to the ‘western branch’ of the

¹ *Report of the Court of Arbitration*, p. 80.

² *Ibid.*, p. 81.

³ *Ibid.*, p. 82.

⁴ *Ibid.*

⁵ *Ibid.*, p. 83.

Encuentro is in reality a reference to the Salto and not to the Encuentro, it is not possible to give effect to these words in that Report. Rather the proper interpretation is to concentrate on the simple, straightforward words in the Award 'follow the River Encuentro to the peak called Virgen' . . . following (the major) channel until it begins to deviate in a marked degree from the direction of Cerro de la Virgen, at which point the line must leave the Encuentro altogether and make for Cerro de la Virgen in a manner as far as possible consistent with the general practice of the award.¹

It is clear from the passage from the Report quoted above that the Court had a great deal of latitude in determining the course of the boundary between the confluence and Cerro Virgen. The Report is to some extent unsatisfactory in not explicitly enunciating the considerations which influenced it to select the boundary line. The reasons given in the Report do not provide a satisfactory explanation, for their application leads to no determinate line. Once the Court had decided that the boundary need not follow the River Encuentro to its source, but should leave the Encuentro at some point to make for Cerro Virgen, the application of this principle would permit the line of the boundary to leave the Encuentro at any point between the confluence and the source of the major (eastern channel). It was not even necessary for the boundary to follow the major channel beyond the confluence at all; a glance at the diagram appended to the award shows that the eastern channel of the Encuentro deviates 'in a marked degree' from the direction of the Cerro Virgen throughout its course from the confluence.

In the absence of more explicit reasons in the Report or the award, it may be legitimately conjectured that this boundary line was selected for the following reasons. First, it gave effect to interests of Chile and of the individual Chilean settlers in the area; for the effect of the award is to give the settled valley—the most important part of the disputed area—to Chile. By not, in terms, appearing to take account of these interests, the Court avoided setting a precedent; for along the course of the Argentine–Chilean frontier there are other colonies of Chilean immigrant settlers. Secondly, apart from the human geography of the area, the boundary chosen seems to have provided—at least along the course of the eastern channel of the Encuentro—a clearer and more physically impassable boundary than would the southern channel. The fact that both sides of the southern channel had been occupied by settlers, but they had not crossed the eastern channel, emphasizes the geographical, as well as social and economic, unity of the valley through which the southern channel flowed. Thirdly, the award line gave some satisfaction to both parties, for it gave to Argentina the larger, although mainly uninhabited, portion of the area in dispute. Also, very largely, it applied the Argentine interpretation of the 1902 award.

¹ Ibid., pp. 80–1.

*Honduras-Nicaragua Boundary case*¹

By a Treaty of 1894, the Governments of Honduras and Nicaragua established a Mixed Boundary Commission '... to settle in a friendly manner all pending doubts and differences, and to demarcate on the spot the dividing line which is to constitute the boundary between the two Republics'.² This Treaty further laid down the rules which the Commission was to apply in the following terms:

1. Boundaries between Honduras and Nicaragua shall be those lines on which both Republics may be agreed or which neither of them may dispute.

2. Those lines drawn in public documents not contradicted by equally public documents of greater force shall also constitute the boundary between Honduras and Nicaragua.

3. It is to be understood that each Republic is owner of the territory which at the date of independence constituted, respectively, the provinces of Honduras and Nicaragua.

4. In determining the boundaries, the Mixed Commission shall consider fully proven ownership of territory and shall not recognise juridical value to *de facto* possession alleged by one party or the other.

5. In case of lack of proof of ownership the maps of both Republics and public or private documents, geographical or of any other nature, which may shed light upon the matter, shall be consulted; and the boundary line between the two Republics shall be that which the Mixed Commission shall equitably determine as a result of such study.

6. The same Mixed Commission, if it deems appropriate, may grant compensation and even fix indemnities in order to establish, in so far as possible, a well-defined, natural boundary line.

7. In studying the plans, maps and other similar documents which the two Governments may submit, the Mixed Commission shall prefer those which it deems more rational and just. . . .³

The Treaty provided that those sectors of the boundary not agreed by the Mixed Commission should be submitted to Arbitration.⁴ The sector from the Portillo de Teotecacinte to the Atlantic was finally submitted to the arbitration of the King of Spain in 1904. In particular, the two Governments could not agree about the point on the Atlantic coast which should constitute the boundary between the two countries. Nicaragua claimed that Nicaraguan territory extended to Cape Camarón; Honduras claimed territory to Sandy Bay.

The award in effect made a compromise between these two claims, fixing the point of the boundary on the Atlantic coast at Cape Gracias á Dios.⁵ The award gives a number of reasons for selecting this point. First, it notes that Rule 3 quoted above provides that

¹ 1906. Award in *R.I.A.A.*, vol. 11, p. 101. See also *I.C.J. Reports*, 1960, p. 192.

² Gámez-Bonilla Treaty, Art. I, *R.I.A.A.*, vol. 11, p. 107.

⁴ Arts. III et seq.

³ Art. II.

⁵ *R.I.A.A.*, vol. 11, p. 117.

... it is to be understood that each of the Republics of Honduras and Nicaragua possesses such territory as on the date of their independence formed respectively the provinces of Honduras and Nicaragua belonging to Spain.¹

The award then goes on to note evidence tending to show that this point had been selected as a boundary point, or was at any rate within the jurisdiction of Honduras at the date of its independence. Furthermore, the award states that there was no evidence that

... the expanding influence of Nicaragua has extended to the north of Cape Gracias á Dios, and therefore not reached Cape Camarón; and that in no map, geographical description or other document of those examined by said Commission is there any mention that Nicaragua had extended to said Cape Camarón, and there is no reason, therefore, to select said Cape as a frontier boundary with Honduras on the Atlantic coast as is claimed by Nicaragua.²

There was, however, evidence of Honduran influence beyond Cape Gracias á Dios, but the award disregarded this for the following reasons:

... though at some time it may have been believed that the jurisdiction of Honduras reached to the south of Cape Gracias á Dios, the Commission of investigation finds that said expansion of territory was never clearly defined, and in any case was only ephemeral below the township and port of Cape Gracias á Dios, whilst on the other hand the influence of Nicaragua has been extended and exercised in a real and permanent manner towards the aforementioned Cape Gracias á Dios, and therefore it is not equitable that the common boundary on the Atlantic coast should be Sandy Bay as claimed by Honduras.³

The award then went on to list further reasons for the selection of Cape Gracias á Dios. Thus, the selection of Sandy Bay or Cape Camarón would require 'artificial divisionary lines . . . (not) well-defined natural boundaries as recommended by the Gámez-Bonilla Treaty . . .'.⁴ The majority of the pre- and post-independence maps showed the frontier as either at Cape Gracias á Dios or to the south of it; only five post-independence maps (three Nicaraguan and two foreign) placed the boundary north of that Cape. Geographical authorities had placed the boundary as near, at or to the south of this Cape.⁵ Furthermore, Cape Gracias á Dios had been recognized as the boundary in several Nicaraguan diplomatic documents. The award consequently summarized the points in favour of the Cape:

... the point which best answers the purpose by reason of historical right, of equity and of a geographical nature, to serve as a common boundary on the Atlantic Coast . . . is Cape Gracias á Dios, and further, as this Cape fixes what has practically been the limit or expansion of encroachment of Nicaragua towards the north and of Honduras towards the south . . .⁶

It was, however, then necessary to determine a boundary line from Cape Gracias á Dios to the Portillo de Teotecacinte. The award noted that there

¹ Ibid., p. 112.

⁴ Ibid.

² Ibid., p. 114.

⁵ Ibid., p. 115.

³ Ibid.

⁶ Ibid.

was no suitable range of neighbouring mountains to serve as the boundary; and thereupon selected the near-by river Coco, Segovia or Wanks:

The course of the said river, at least a good portion of it, owing to the direction in which it flows and to the conditions of its bed, offers the most precise and natural boundary which could be desired.¹

Furthermore, this river had appeared as the frontier on many maps, public documents and geographical descriptions as the frontier, and there was evidence that this had been recognized as the frontier by both Honduras and Nicaragua and other States. Consequently, the bay and town of Gracias á Dios were in fact awarded to Nicaragua.

The award further determined that the boundary should leave the Coco at the confluence of the River Poteca—which had also been regarded as part of the boundary by ‘several authorities’. Thence the boundary should follow the Poteca until it joined the River Guineo or Namasli, to arrive at the Portilla de Teotecacinte, leaving, however, the site of Teotecacinte within the jurisdiction of Nicaragua—following a demarcation of 1720.²

The Arbitrator supported the deviations of the boundary from ‘territory held under undisputed sway’, admitting that the boundary favoured Nicaragua at Cape Gracias á Dios, and Honduras was favoured in the northern valley of the Segovia, by reference to Rule 6 (quoted above) which permitted compensations and indemnifications ‘to bring about if possible, well-defined natural boundaries’.³

Nicaragua contested the validity of the award on a number of grounds, including the allegation that the arbitrator had exceeded his powers by applying certain of the rules (in particular Rule 6) laid down for the mixed boundary commission to apply and in failing to apply others (in particular Rules 3 and 4). By an agreement of 1957 the dispute was referred to the International Court of Justice, which decided that the award was valid.⁴

The reasoning of the Court’s decision, on the *excès de pouvoir* question as on the others, is based mainly on initial acceptance by Nicaragua of the award.⁵ The Court did, however, consider the grounds of nullity alleged by Nicaragua, and rejected them. Regarding the alleged failure to apply Rules 3 and 4 by fixing a ‘natural boundary line’ rather than one in accordance with the *uti possidetis* line, it said:

This complaint is without foundation inasmuch as the decision of the arbitrator is based on historical and legal considerations (*derecho historico*) in accordance with paragraphs 3 and 4 of Article II.⁶

Regarding the allegation that the arbitrator was not authorized to make compensations according to Rule 6 to establish a clearly defined natural

¹ *R.I.A.A.*, vol. 9, p. 115.

² *Ibid.*, p. 116.

³ *Ibid.*

⁴ *I.C.J. Reports*, 1960, p. 217.

⁵ *Ibid.*, pp. 213–14.

⁶ *Ibid.*, p. 215.

boundary since that discretion was vested solely in the Mixed Commission, the Court said:

The Court is unable to share this view. An examination of the Treaty shows that the rules laid down in Article II were intended not only for the guidance of the Mixed Commission to which they expressly referred but were also intended to furnish guidance for the arbitration. No convincing reason has been adduced by Nicaragua in support of the view that, while the remaining paragraphs of Article II were applicable to the arbitrator, paragraph 6 was excluded and that, if it was not excluded, the arbitrator, in applying it, exceeded his powers. In the view of the Court, the arbitrator was under obligation to take into account the whole of Article II, including paragraph 6, to assist him in arriving at his conclusions with regard to the delimitation of the frontier between the two States and, in applying the rules in that paragraph, he did not go beyond its legitimate scope.¹

The Court thus hardly considered the problem of the powers of the arbitrator, and, in particular, his power to apply concepts of equity.

The dissenting opinion of Judge Urrutia Holguín² (the Nicaraguan Judge *ad hoc*) provides a more interesting and elaborate discussion of the problem. Primarily he emphasized that:

The countries of Latin America whose constitutions had fixed their boundaries on the basis of the *uti possidetis juris* existing at the time when they became independent envisaged only strictly legal decisions when they undertook to submit the delimitation of their boundaries to arbitration.

This rule which the parties laid down for recourse to arbitration was not merely academic but a condition precedent *sine qua non* which had its origin in the actual constitutions of the States.

...

The countries which asked the King of Spain to interpret the *uti possidetis juris* in accordance with the titles of Spanish sovereignty thus did so because they thought that he was the best qualified authority to interpret his own legal rules, but they certainly did not think of entrusting to 'his equity' the interpretation of constitutional clauses which had in fact been approved for the very purpose of throwing off the Spanish yoke.³

With regard to the rules laid down in Article II of the Gámez-Bonilla Treaty and the rules actually applied by the arbitrator, Judge Urrutia Holguín dissented from the majority view. In his view, a consequence of the primary emphasis accorded to the *uti possidetis juris* was that all the rules laid down in that Article had not the same importance.

The rules which constituted a condition precedent governing the whole arbitration were those of paragraphs 3 and 4 on the fixing of the boundaries in accordance with the legal titles existing at the date of independence.⁴

¹ Ibid.

² Ibid., pp. 221 et seq.

³ *I.C.J. Reports*, 1960, p. 226-7. Cf., however, the *Guatemala-Honduras* award, discussed below, p. 50. Judge Holguín cited this as an example of the infrequent reference to 'equity' as a basis of decision even where specific authority was conferred by the *compromis* (ibid., p. 233) But see the discussion of this award below.

⁴ Ibid., p. 229.

Even if the King had the authority to make compensation, in Judge Holguín's view he had exceeded that authority in the actual terms of the award:

... to compensate does not mean to conciliate ... Compensation can only be granted in respect of territories that are equivalent. There is no kind of equivalence or compensation as between the few hectares of the village of Gracias á Dios and the whole northern basin of the Segovia River, and the King made use of the power conferred by paragraph 6 not to grant compensation but to settle the dispute as mediator or arbitrator of conscience.¹

Furthermore, Judge Holguín considered that the Nicaraguan contention that the award was insufficiently reasoned was well founded, since the reasoning of the award referred insufficiently to legal considerations: '... if the King had not found sufficient reasons to make a decision on the basis of law, he should have declined to promulgate his Award ...'.² That is, a *non liquet* would have been the appropriate solution.

Although this case directly raised the issue of the authority of an arbitrator to render a decision on the basis of a variety of considerations not always regarded as strictly 'legal', it gives no satisfactory answer. The issue could be, and was, avoided because broad powers were in fact conferred in the treaty of arbitration—though not explicitly on the arbitrator. Furthermore, inaction on the part of Nicaragua could be, and was, pointed to.

Consequently, the judgment of the Court is of more interest for its application of the concept of acquiescence to estop a party from challenging even what might have been an originally invalid award. Although the application of this concept may well have been justified on the facts of the case (Judge Holguín, at pp. 235 et seq., noted a degree of ambivalence in the attitude of both parties), it is a far from satisfactory doctrine for general application. In the judgment of the Court it is not clear what the legal effect of this acquiescence is supposed to be. In the quotation given above alternative considerations are mentioned: first, that a party is bound by an explicit recognition of the validity of an award, and cannot thereafter challenge its validity; second, that if a party fails to challenge an award for some indefinite period of time after knowing its full terms, it is estopped from future challenge. Both approaches require further elaboration, since they raise practical and theoretical difficulties. In the former case, where there is some explicit positive act of recognition, the theoretical basis for the validity of the 'award' is clear: although the award is a nullity there is a subsequent express agreement between the parties to define a frontier, say, in the same terms.³ One practical difficulty is, however, that it may subse-

¹ *I.C.J. Reports*, 1960, p. 233.

² *Ibid.*, p. 235.

³ See Judge Holguín (*ibid.*, p. 222): 'In civil law there are acts which are null and void which cannot be given life even by subsequent acceptance by the parties. In international law, however,

quently appear that the award contains gaps, or other defects—is partially or totally vitiated by mistake, say (cf. the Argentine–Chile award). In this case presumably it is the subsequent agreement to carry out the terms of the award which is wholly or partially invalid, on the ground, perhaps, of ‘error’. Clearly, however, recognition does not always have such definitive effects that it cannot be gone back on. On the other hand, although inaction may result in an estoppel, it is not easy to see how it can in any sense validate the award: inaction by one party could not render an invalid award binding on the other party. The result should surely be that the award, if invalid, remains so, and is, as such, unenforceable; if one party wishes to put it into effect and is in a position to do so, and demarcates the boundary, say, according to the terms of the award, the other party may be estopped by a period of inaction from challenging the *demarcation*, rather than the award itself. The *rationale* of this ‘estoppel’ would then be that ‘stability of boundaries’ emphasized in the *Temple* case.¹

*Island of Palmas case (Netherlands v. U.S.A.)*²

This dispute related to sovereignty over the Island of Palmas (as it was called by the Netherlands), situated between the Philippines and the Netherlands East Indies. Sovereignty was claimed by both the Netherlands and the United States of America. The dispute was referred to the Permanent Court of Arbitration, and the two parties requested Max Huber (Switzerland) to act as sole arbitrator. The agreement for arbitration provided that:

The sole duty of the Arbitrator shall be to determine whether the Island of Palmas (or Miangas) in its entirety forms a part of territory belonging to the United States of America or of Netherlands territory.³

The immediate foundation of the United States’ claim was a Treaty of Peace of 1898 by which Spain had ceded the Philippines, including the Island of Palmas, to the United States. It was admitted, however, that this treaty could not be interpreted as transferring rights over territory to which Spain had no title. The validity of the United States’ claim therefore

States are sovereign and are bound by no limitation upon their acceptance of or agreement to anything whatsoever.

‘States may agree . . . to the carrying out of the provisions of a null and void award, but in that case the cause and the legal basis of the provisions of the award are not to be found in the award which is a nullity, but in the valid agreement between two sovereign States.

‘If there are in the award itself any essential defects of which the parties cannot know before they receive the text of the award, it is possible to regard as acquiescence only some formal declaration by the competent organ of the State making clear that it expressly renounces the right to dispute the validity of the award.’

¹ See below, p. 96, for a discussion of certain difficulties surrounding the application of the concepts of acquiescence and estoppel in international law.

² 1928. Award in *R.I.A.A.*, vol. 2, p. 829.

³ Art. I, *ibid.*, pp. 831–2.

depended on whether Spain had an effective title to the island at that date. It was contended Spain had such a title, founded on both discovery and, by virtue of the principle of contiguity, on the geographical unity of the island with the Philippine group as a whole.

The claim of the Netherlands was founded on the exercise of rights of sovereignty through the medium of the East India Company, at least from 1677 to the date at which the dispute arose. This sovereignty was said to arise out of agreements with native princes, establishing Netherlands suzerainty over the territories of those princes.

The general remarks made in the award on territorial sovereignty are well known. It is sufficient to note the stress which Max Huber laid on the importance of a 'continuous and peaceful display of the functions of State within a given region' as 'a constituent element of territorial sovereignty', and decisive in cases of disputed title.¹ The island was awarded to the Netherlands on this ground.² It will be recalled that the acts of sovereignty relied on were scanty; the award notes that:

The acts of indirect or direct display of Netherlands sovereignty at Palmas (or Miangas), especially in the 18th and early 19th centuries are not numerous, and there are considerable gaps in the evidence of continuous display. But apart from the consideration that the manifestation of sovereignty over a small and distant island, inhabited only by natives, cannot be expected to be frequent, it is not necessary that the display of sovereignty should go back to a very far distant period. It may suffice that such display existed in 1898, and had already existed as continuous and peaceful before that date long enough to enable any Power who might have considered herself as possessing sovereignty over the island, or having a claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights.

It is not necessary that the display of sovereignty should be established as having begun at a precise epoch; it suffices that it had existed at the critical period preceding the year 1898. It is quite natural that the establishment of sovereignty may be the outcome of a slow evolution, of a progressive intensification of State control. This is particularly the case, if sovereignty is acquired by the establishment of the suzerainty of a colonial Power over a native State, and in regard to outlying possessions of such a vassal State.³

The award goes on to state that, even were it admitted that the evidence was insufficient to establish 'continuous and peaceful display of sovereignty' over the island, still the arbitrator had authority under the *compromis* to award the island to the Netherlands in a decision 'founded on the relative strength of the titles invoked by each Party':⁴

A solution on this ground would be necessary under the Special Agreement. The terms adopted by the Parties in order to determine the point to be decided by the Arbitrator (Article 1) presuppose for the present case that the Island of Palmas (or

¹ *R.I.A.A.*, vol. 2, p. 840.

³ *Ibid.*, p. 867.

² *Ibid.*, pp. 866-9.

⁴ *Ibid.*, p. 869.

Miangas) can belong only either to the United States or to the Netherlands, and must form in its entirety a part of the territory either of the one or of the other of these two Powers, parties to the dispute. For since, according to the terms of its Preamble, the Agreement . . . has for object to 'terminate' the dispute, it is the evident will of the Parties that the arbitral award shall not conclude by a 'non liquet', but shall in any event decide that the island forms a part of the territory of one or the other of two litigant Powers.

The possibility for the Arbitrator to found his decision on the relative strength of the titles invoked on either side must have been envisaged by the parties to the Special Agreement, because it was to be foreseen that the evidence produced as regards sovereignty over a territory in the circumstances of the island in dispute might prove not to be sufficient to lead to a clear conclusion as to the existence of sovereignty.¹

In this case, the island would still be awarded to the Netherlands, since that State had at least performed some acts of sovereignty, such as putting up flags and coats of arms on the island:

These facts at least constitute a beginning of establishment of sovereignty by continuous and peaceful display of State authority, or a commencement of occupation of an island not yet forming a part of the territory of a State; and such a state of things would create in favour of the Netherlands an inchoate title for completing the conditions of sovereignty. Such inchoate title, based on display of State authority, would, in the opinion of the Arbitrator, prevail over an inchoate title derived from discovery, especially if this latter title has been left for a very long time without completion by occupation; and it would equally prevail over any claim which, in equity, might be deduced from the notion of contiguity. International law, like law in general, has the object of assuring the coexistence of different interests which are worthy of legal protection. If, as in the present instance, only one of the conflicting interests is to prevail, because sovereignty can be attributed to but one of the Parties, the interest which involves the maintenance of a state of things having offered at the critical time to the inhabitants of the disputed territory and to other States a certain guarantee for the respect of their rights ought, in doubt, to prevail over an interest which—supposing it to be recognized in international law—has not yet received any concrete form of development.²

It will be recalled that a further basis for the claim of the United States was the concept of contiguity, represented by the geographical unity of the Philippines. The Arbitrator gave a number of reasons for rejecting this argument. First, he considered that contiguity alone was not a root of title sufficiently established in international law. It was, however, a consideration of equity. Second, the principle was not easily applicable to the island in question, which was both isolated and formed part of an extensive archipelago comprising both the Philippines and the Netherlands East Indies, 'in which strict delimitations between the different parts are not naturally obvious'. Third, the island was permanently inhabited and therefore acts of actual administration were of much weightier importance.³

¹ Ibid. This is criticized by Friedmann, loc. cit. (above, p. 13 n. 3), pp. 33-7.

² *R.I.A.A.*, vol. 2, p. 870.

³ Ibid., pp. 854-5, 870.

For present purposes the following are the most noteworthy features of this award:

(1) 'The importance attached to the 'continuous and peaceful display of the functions of a State within a given region' as 'a constituent element of territorial sovereignty', in contrast to the technical concepts of 'prescription' and 'occupation' which were not referred to.

(2) 'The doubts expressed by the Arbitrator as to whether even that requirement, modified still further in application to 'a small and distant island, inhabited only by natives', had been fulfilled.

(3) 'The view expressed by him that, even if the elastic criterion which he had formulated had not been met, he had authority under the *compromis*—and indeed was required by it—to award the island to one or the other party on the basis of 'the relative strength of the titles invoked on either side'.

An award on the basis of 'the relative strength of the titles invoked' in effect means a decision based on the relative interests of the parties in the territory—the sort of process seen in boundary awards. A similar approach, formulated in slightly different terms, was made by Judge Lagergren in the *Rann of Kutch* arbitration. Referring to Huber's award, he said:

Territorial sovereignty implies . . . certain exclusive rights which have as their corollary certain duties. In adjudging conflicting claims by rival sovereigns to a territory, all available evidence relating to the exercise of such rights, and to the discharge of such duties, must be carefully evaluated with a view to establishing in whom the conglomerate of sovereign functions has exclusively or predominantly vested.¹

*Honduras Borders case (Guatemala v. Honduras)*²

This dispute between Honduras and Guatemala related to the course of the boundary between them. It was referred to a Special Tribunal³ by agreement between the parties. The Tribunal was composed of two members chosen by the Governments of Guatemala and Honduras respectively from the list of jurisconsults composing the International Central American Tribunal. The two Governments jointly named as third arbitrator and President of the Tribunal the Chief Justice of the United States of America, Charles Evans Hughes.⁴

¹ See below, p. 70.

² 1933. *R.I.A.A.*, vol. 2, p. 1307. See *American Journal of International Law*, 27 (1933), p. 403 for discussion of the award and map.

³ The tribunal was 'organised in the manner prescribed in the Convention setting up an International Central American Tribunal' (Art. I). The parties disagreed as to whether the International Central American Tribunal had jurisdiction over this dispute: this was the preliminary question which the tribunal was required to decide. The tribunal answered this question in the negative (*R.I.A.A.*, vol. 2, p. 1321). Art. I of the Special Agreement further provided that, in that case, ' . . . the same tribunal shall, acting as a special delimitation court, adjudicate the frontier dispute between the High Contracting Parties'. It was in this capacity of 'special delimitation court' that the tribunal made its award, therefore.

⁴ Art. II.

The Special Agreement recorded that the parties were agreed that 'the only line that can be established *de jure* between their respective countries is that of the *Uti Possidetis* of 1821'. The Tribunal was therefore required to determine that line. It was, furthermore, required to modify that line to take account of interests acquired beyond that line since 1821 by either party, and to fix equitable compensation—territorial or otherwise—for such modifications.¹

This award illustrates the practical difficulties of applying the principle of *uti possidetis*. The Parties disagreed on whether the Tribunal was required to establish the boundary on the basis of *uti possidetis juris* or *de facto*.² The Tribunal determined that the test was 'one of the administrative control held prior to independence pursuant to the will of the Spanish Crown'.³ This was in effect a compromise between the two possible interpretations: for the Tribunal indicated that the evidence which might be relied on to establish the boundary included not only explicit manifestations of that will—in the form of rescripts, laws and decrees, etc.—but also acquiescence in the face of assertions of administrative authority by the provinces.⁴ Furthermore, the Tribunal emphasized the significance of the declarations and acts of the parties on attaining independence; this constituted:

... a virtually contemporaneous and solemn declaration of the extent of administrative authority deemed to have been enjoyed by the preceding colonial entity. The Constitutions of the new States, and the governmental acts of each, especially when unopposed, or when initial opposition was not continued, are of special importance.⁵

But the Tribunal, having permitted itself this wide concept of the *uti possidetis* criterion, found it impossible to establish the line of *uti possidetis* in considerable portions of the boundary in dispute. It noted the difficulties in general terms:

It must be noted that particular difficulties are encountered in drawing the line of '*uti possidetis* of 1821', by reason of the lack of trustworthy information during colonial times with respect to a large part of the territory in dispute. Much of this territory was unexplored. Other parts which had occasionally been visited were but vaguely known. In consequence, not only had boundaries of jurisdiction not been fixed with precision by the Crown, but there were great areas in which there had been no effort to assert any semblance of administrative authority.⁶

¹ Art. V. The High Contracting Parties are agreed that the only line that can be established *de jure* between their respective countries is that of the *Uti Possidetis* of 1821. Consequently, it is for the Tribunal to determine this line. If the Tribunal finds that either Party has during its subsequent development acquired beyond this line interests which must be taken into consideration in establishing the final frontier, it shall modify as it may consider suitable the line of the *Uti Possidetis* of 1821 and shall fix such territorial or other compensation as it may deem equitable for one Party to pay to the other.

² *R.I.A.A.*, vol. 2, p. 1322.

³ *Ibid.*, p. 1324.

⁴ *Ibid.*, pp. 1324–5.

⁵ *Ibid.*, p. 1325.

⁶ *Ibid.*

In particular disputed areas there might be other reasons why the criterion of *uti possidetis* could not be applied: at the date of independence the town of Omoa had been withdrawn from the control of the Provincial Government of Honduras, and placed under the separate control of the Captaincy-General of Guatemala. Thus it was not under the administrative control of either party at that date.¹ What administrative authority exercised control over the contiguous area of Cuyamel was also obscure.² In consequence, if the Tribunal was to determine the entire course of the disputed boundary, it was forced to apply criteria other than that of *uti possidetis* of 1821, and also to find authority for so doing.

The Tribunal found authority to determine the entire course of the boundary to be implied in the terms of the Special Agreement. The purpose of that Agreement was 'the establishment of a definitive boundary between Guatemala and Honduras'.³ The Tribunal therefore concluded that:

In the light of the declared purpose of the Treaty, the Tribunal is not at liberty to conclude that the lack of adequate evidence to establish the line of *uti possidetis* of 1821, throughout the entire territory in dispute, relieves the Tribunal of the duty to determine the definitive boundary to its full extent. The Tribunal, by the provisions of the Treaty as to the line of *uti possidetis* of 1821, is not required to perform the impossible, and manifestly is bound to establish that line only to the extent that the evidence permits it to be established. And as the Tribunal is expressly authorized in the interests of justice, as disclosed by subsequent developments, to depart from the line of *uti possidetis* of 1821, even where that line is found to exist, the Treaty must be construed as empowering the Tribunal to determine the definitive boundary as justice may require throughout the entire area in controversy, to the end that the question of territorial boundaries may be finally and amicably settled.⁴

The Tribunal further found the criteria that it should apply to be implied in the terms of the *compromis*. It will be recalled that the Tribunal was expressly authorized to *modify* the *uti possidetis* line to take account of 'interests' acquired by either party beyond that line 'during its subsequent development'.⁵ Consequently, the Tribunal inferred a parallel implied authority to take account of interests derived from actual possession, settlement and exploitation to fill in gaps in the *uti possidetis* line.⁶ It did not, however, consider that it had authority to give primary importance to geographical, or *potential* military or economic considerations. The Tribunal formulated its approach in the following terms:

The criteria to be applied by the Tribunal in the exercise of this authority are plainly indicated. It is not the function of the Tribunal to fix territorial limits in its view of what might be an appropriate division of the territory merely with reference to geographical features or potential advantages of a military or economic character, apart from the historical facts of development. The Treaty cannot be construed as authorising

¹ *R.I.A.A.*, vol. 2, pp. 1335-6.

⁴ *Ibid.*, p. 1352.

² *Ibid.*, pp. 1336-7.

⁵ Art. V.

³ *Ibid.*, p. 1351.

⁶ *R.I.A.A.*, vol. 2, p. 1352.

the Tribunal to establish a definitive boundary according to an idealistic conception, without regard to the settlement of the territory and existing equities created by the enterprise of the respective Parties. So far as may be found to be consistent with these equities, the geographical features of the territory indicating natural boundaries may be considered.

In fixing the boundary, the Tribunal must have regard (1) to the facts of actual possession; (2) to the question whether possession by one Party has been acquired in good faith, and without invading the right of the other Party; and (3) to the relation of territory actually occupied to that which is as yet unoccupied. In the light of the facts as thus ascertained, questions of compensation may be determined.¹

The award deals with the definitive boundary in five sections, applying the general criteria listed above to the particular circumstances of the sections. In the first section—from the Salvadorean boundary to Cerro Oscuro—the award applied the line of actual possession; where, in the southern part of the section, the line of actual possession was not found to be clearly defined, and there were a number of conflicting land grants, the award applied a natural boundary, the Frio river. This incidentally placed within Guatemalan territory two Guatemalan settlements to the north of that river.² In the second section—from Cerro Oscuro to Angostura on the Managua river—the award followed the line of present possession ‘with a few local changes which are necessary . . . in order to provide a practicable dividing line’. This line did not correspond to the *uti possidetis* of 1821, but the Tribunal found no means of measuring the respective equities of the parties, or of determining the balance of advantage resulting from the encroachments, or of rectifying the line to secure a more equitable boundary.³ In the third section—the territory lying north-east of Angostura and east of the Managua river, and south and east of the Motagua river, and extending to the Merendon range—no line of *uti possidetis* in 1821 had been determined. The mountain range of the Merendon although clearly a natural boundary was excluded as part of the boundary, for its selection would have conflicted with the line of the boundary in areas not in dispute and also with the line of actual possession. Therefore, the Tribunal applied the criterion of ‘the actual occupation established by the Parties in good faith’.⁴ In case of conflict ‘Priority in settlement in good faith would appropriately establish priority of right’.⁵ In the fourth section—Omoa and the Cuyamel area—the line of *uti possidetis* in 1821 could not be applied, for Omoa was not then in the possession of either province. Honduras had been in possession of Omoa since 1832, and the town had originally belonged to the province of Honduras. It was therefore awarded to Honduras. The area

¹ Ibid. The Tribunal was empowered to utilize the services of experts, Art. XIII, and it therefore had an aerial survey of parts of the area made.

² Ibid., pp. 1353–5.

⁴ Ibid., p. 1358.

³ Ibid., pp. 1355–7.

⁵ Ibid., p. 1359.

held by Honduras in the Cuyamel district was similarly awarded to Honduras.¹ In the fifth section—from Cerro Escarpado to the Tinto river flowing out of the Laguna Tinta—there was some conflicting activity of the parties. The award applied the principle of priority of activity.²

The important features of the award for present purposes may be summarized as follows:

(1) The Tribunal was expressly authorized only to determine the *uti possidetis* of 1821 in the disputed area, and to modify that line to take account of after-acquired interests. The Tribunal further considered that it was impliedly authorized to determine the entire course of the boundary, whether the *uti possidetis* could be established wholly or not. It considered, however, that the criteria on which it might base its determination were limited to those referred to in the agreement for arbitration, in particular 'the historical facts of development' rather than merely potential interests.

(2) Although the Tribunal was expressly directed to apply the rule of *uti possidetis* as of 1821, it found great difficulty in doing so. It was faced first with the problem of interpreting the rule—whether one of *uti possidetis juris* or *de facto*. This it resolved by a compromise interpretation, referring to the legal position as modified by custom and acquiescence and evidenced by the acts and declarations of the parties after attaining independence. Despite this liberal interpretation which permitted reference to evidence of administration both before and since 1821, the Tribunal was unable to establish the line in considerable sectors of the boundary. It filled the gaps on the basis of a number of criteria. First and foremost was that of actual present possession. This criterion of 'possession' was, it should be emphasized, not the traditional international law concept of 'prescription' or 'occupation'. It was not limited to State activity unambiguously '*à titre de souverain*', nor defined by any requirements of length of time or continuity of acts. It simply referred to an amalgam of State interests derived from both private and public activity both of central and local government organs and of nationals settling or exploiting a disputed area. In one area there was a conflict between State and private interests: a land grant had been made by one party to a national of the other. The territory in this case was awarded to the grantor State. In applying the criterion of possession, conflicts were resolved by adopting the criterion that priority in settlement gave priority of right. Where this could not be determined, the criterion of the 'natural' boundary (usually rivers) was applied. Where necessary, the boundary resulting from the line of actual possession was modified to give a 'practicable dividing line'. One sector, Omoa and Cuyamel, seems to have been awarded to Honduras on the criteria of both present possession and historical links.

¹ *R.I.A.A.*, vol. 2, pp. 1360–2.

² *Ibid.*, p. 1362–4.

III. THE ATTRIBUTION OF SOVEREIGNTY OVER SEA AREAS BY JUDICIAL AND ARBITRAL TRIBUNALS

The only awards of this century dealing significantly with the attribution of sovereignty over sea areas are the *Grisbadarna*, *North Atlantic Coast Fisheries*, *Gulf of Fonseca* and *Anglo-Norwegian Fisheries* cases. The first concerns the course of the maritime boundary between two neighbouring, and adjacent, States; the other three concern the boundaries between coastal States and a *res communis*—the high seas. The *North Atlantic Coast Fisheries* and *Gulf of Fonseca* awards discuss, *inter alia*, the criteria for the enclosure of bays within national waters. These criteria are of particular interest, because they were referred to in the Norwegian arguments in the *Anglo-Norwegian Fisheries* case. It may be assumed that they were reflected in that part of the Court's judgment where reference was made to the general criteria governing the enclosure of sea areas within national territory.

Certain significant characteristics of maritime, as contrasted with land, territory should be noted. Geographical and economic criteria for the attribution of sovereignty assume particular importance: this may be observed in the relationship between the geographical and legal concepts of a 'bay', and in the peculiar geographical situation where land and sea areas intermingle—as in archipelagos and coastal indentations and fringes—exemplified in the *Anglo-Norwegian Fisheries* case. Moreover, maritime areas are, in general, neither inhabited nor habitable, and thus are not—within the traditional terminology of territorial acquisition—subject to 'effective occupation'. They may, however, be exploited for their natural resources or for purposes of transit, etc., and such exploitation may clearly be linked with neighbouring land areas. Conversely, distant sea areas may be utilized and even intensively exploited by nationals of States with no geographical links with the area. Similarly, although adjacent sea areas may be important for the defence of land territory, they may also be used by, and of importance to, geographically unconnected States. Consequently, the delimitation of sea areas always has 'an international aspect'. It always involves the establishment of a boundary and the weighing and assignment of priorities to the interests of both coastal States and other users of the areas in question. Primarily these interests will be economic, commercial and military.

Where the boundary between only two States is in issue, the weighing of interests will be similar in character to that required in determining land boundaries. The determination of the boundary in the *Grisbadarna* case shows no particularly unusual features. But it may be suggested that the determination of the outer maritime boundaries of a State raises radically

different problems. Between two States, just shares in a limited resource can be reasonably objectively determined: the concept 'equality is equity' may be resorted to initially, and subsequently modified to take account of specific, clear interests. No such simple starting-point of what is 'fair' or 'equitable' is available in the case of conflicting claims to territory by an individual State and States in general. It is necessary to begin with a presumption in favour of one or the other which can only be determined by broader policy considerations. The problem is perhaps less difficult where, as in the *Anglo-Norwegian Fisheries* case, the dispute is still substantially between the conflicting interests of the two States.

*Maritime Frontier case (Norway v. Sweden)*¹

This dispute between Norway and Sweden related to the sea boundary between the two countries. It was referred to arbitration by agreement between the two parties.² The Arbitral Tribunal consisted of a Norwegian and a Swede, with a Dutch President.³

The *compromis* directed the Court first to apply a Boundary Treaty of 1661—and the map annexed to it—and secondly, to have regard to circumstances of fact and the principles of international law in fixing any part of the boundary which the court did not find had been determined by the Treaty of 1661.⁴

The map illustrating the award shows the boundary determined by the Court to be a compromise between the Norwegian and Swedish claims. It favours Sweden, for it assigns the Grisbadarna to Sweden; but it assigns the Skjöttegrunde to Norway.

The reasoning of the award is complicated and ingenious. First, it asserts that under the *compromis* '... the Court retains complete freedom to determine upon the boundary within the limits of the respective pretensions'.⁵ Second, the parties were in agreement on the line of the boundary up to a point XIX. Up to this point they applied the principle of a median line drawn between all islands, etc., which were not always submerged.⁶ The parties considered that the Treaty of 1661 had applied that principle in so far as it had defined the boundary. From point XIX to XX, the claims of the parties diverged slightly; this difference depended on whether, to deter-

¹ Award (1909) in Wilson, *The Hague Arbitration Cases*, p. 102; Scott, *The Hague Court Reports*, p. 121.

² *Ibid.*

³ Art. I.

⁴ Art. III: 'The court of arbitration shall decide whether the boundary line should be considered, either wholly or in part, as fixed in the boundary treaty of 1661 with the map thereto annexed, and in what manner the line thus established, should be drawn, as also in so far as the boundary line shall not be considered as fixed by that treaty and map, the court shall fix the boundary line, having regard to the circumstances of fact and the principles of international law.'

⁵ Wilson, *op. cit.* (above, n. 1), p. 119; Scott, *op. cit.* (above, n. 1), p. 126.

⁶ *Ibid.*

mine that point, one determined the mid-point of a line drawn from the Heiefluer or the Hejeknub reefs on the Norwegian side, to Stora Drammen on the Swedish side.¹ The Court determined this question in favour of Sweden, on the basis that if the parties were applying a median line principle because they considered that it had been applied by the Treaty of 1661, then this

... ought to have as a logical consequence that, in applying it in our times, one should take account at the same time of the circumstances in fact existing at the time of the Treaty.²

Therefore, in the opinion of the Court, because it was uncertain whether the Heiefluer reefs had emerged from the water in 1661, the line ought to be drawn from the Hejeknub.³ This seems a somewhat curious decision; for it was agreed that the Treaty of 1661 did not itself cover the boundary as far as point XX, but only as far as an indeterminate point A situated somewhere between points XIX and XX.⁴

Thirdly, the claims of the two parties diverged considerably from point XX onwards. Each party claimed the Grisbadarna and the Skjöttegrunde. Both parties agreed that the boundary in this sector had not been determined by the Treaty of 1661.⁵ Therefore, according to the *compromis*, it fell to be determined by the Tribunal 'having regard to the circumstances of fact and the principles of international law'. It was agreed that in this sector the maritime boundary had been partitioned automatically between the parties as a result of the Peace of Roskilde in 1658.⁶ The Court agreed with this opinion, giving the reason that:

[It] is in conformity with the fundamental principles of the law of nations, both ancient and modern, according to which maritime territory is a necessary appurtenance of the land territory, from which it follows that at the moment that in 1658, the land territory called Bohuslän was ceded to Sweden, the area of maritime territory forming the inseparable appurtenance of the land territory should automatically make a part of that cession. . . .⁷

In consequence, the Court considered that the principle of the inter-temporal law must be applied.⁸ The Court therefore rejected the Norwegian claim founded on the application of the median line principle, for the following reasons, *inter alia*. First, that the fact (which the Court doubted) that this principle had been followed in the Treaty of 1661 did not require its application in an area not explicitly covered by that Treaty;⁹ and, second,

¹ Wilson, *ibid.*, p. 121; Scott, *ibid.*, pp. 126-7.

² Wilson, *ibid.*; Scott, *ibid.*

³ *Ibid.*: 'Whereas, as the Heiefluer are reefs of which, with a sufficient degree of certainty, one cannot assume, at the time of the delimitation of 1661, that they had emerged from the water, . . . As, consequently, at that epoch they could not have served as a point of departure for a delimitation of frontier; . . . the Hejeknub ought to be preferred to Heiefluer . . .'

⁴ Wilson, *op. cit.* (above, p. 56 n. 1), p. 119; Scott, *op. cit.* (above, p. 56 n. 1), p. 126.

⁵ Wilson, *ibid.*, p. 121; Scott, *ibid.*, p. 127.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Wilson, *ibid.*, p. 123; Scott, *ibid.*, p. 127.

⁹ *Ibid.*

that neither the principle of the median line, nor that of the *thalweg*, or the most important channel, had gained sufficient acceptance in the seventeenth century to be applied automatically.¹ The Court preferred to apply a principle of drawing a boundary perpendicular to the general direction of the coast:

... it is ... much more in accord with the ideas of the 17th century and with the notions of law prevalent at that epoch to admit that the automatic division of the territory in question ought to have been made according to the general direction of the land territory of which the maritime area forms an appurtenance, and consequently to apply, in order to reach a lawful and just determination of the boundary, the same principle in our day;

... consequently, the line of automatic partition of 1658 ought to be determined, or ... the partition of to-day ought to be made by drawing a line perpendicular to the general direction of the coast ...²

The Court did not apply this principle without modification however. It noted that it must take 'careful account of the need of indicating the boundary in a clear and unequivocal manner, and of making easy, so far as possible, the respect for the interests of those concerned'.³ Consequently, after finding that a line perpendicular to the general direction of the coast would run 20° south of west, and that such a line would cut the Grisbadarna banks, and that 'the parties are in accord in recognizing the great inconvenience there would be in drawing the boundary line across the important banks',⁴ the Tribunal found that a line 19° south would suit the purpose. The advantages of this line were that it 'would altogether avoid that inconvenience [of cutting the banks] since it would pass just north of the Grisbadarna and to the south of the Skjöttegrunde and ... would not cross any other important bank'.⁵

The Court also referred to circumstances of fact in support of this decision, the effect of which was to assign the Grisbadarna banks to Sweden and the Skjöttegrunde to Norway. These facts were the following:

a. The fact that the fishery for lobsters in the shoals of Grisbadarna has been carried on since a time much more remote, in a much more extended measure and by a much greater number of fishermen on the part of the inhabitants of Sweden than on the part of those of Norway,

b. The fact that Sweden has performed in the region of Grisbadarna, particularly in recent times, many acts based on the belief that these regions were Swedish, as, for example, the placing of beacons, the survey of the sea and the locating of a lightship, which acts involved considerable expense and by which she did not think merely to exercise a right but even more still, to perform a duty; while Norway, by her own confession in these several respects has been much less or almost not at all concerned as to these regions. ...⁶

¹ Wilson, *The Hague Arbitration Cases*, p. 125; Scott, *The Hague Court Reports*, p. 129.

² Ibid.

³ Wilson, *ibid.*, p. 127; Scott, *ibid.*, p. 129

⁴ Ibid.

⁵ Ibid.

⁶ Wilson, *ibid.*, pp. 127-9; Scott, *ibid.*, p. 130

With regard to the facts in paragraph (a), the Court listed, *inter alia*, the following reasons for taking them into account:

(1) That 'in the law of nations, it is a well established principle that it is necessary to refrain as far as possible from modifying the state of things existing in fact and for a long time';¹

(2) That 'that principle has a very particular application when private interests are in question, which, once disregarded, cannot be preserved in an effective manner even by any sacrifices of the State, to which those interested belong';²

(3) That the most important lobster fishery was on the Grisbadarna banks, and these had been exploited first and most effectively by the Swedes, rather than by the Norwegians, and 'that fishery in general has more importance for the inhabitants of Koster (on the Swedish side) than for those of Hvaler (on the Norwegian side) . . .'.³

With regard to the facts in paragraph (b), the Court drew the implication from them that 'Sweden has no doubt of her right to Grisbadarna, as . . . she has not hesitated in incurring the cost resting on an owner or possessor of the banks even to a very considerable sum'.⁴

As to the justice of assigning the Skjöttegrunde to Norway, the Court gave the following reasons:

. . . a demarcation which confers Skjöttegrunde—the less important part of the disputed territory—upon Norway is sufficiently supported, on one side, by the circumstance of the weighty fact that although one should conclude from different documents and witnesses that the Swedish fishermen . . . have engaged in fishing in the regions in dispute since a more remote time, in a wider measure and in greater number, it is certain on the other hand that the Norwegian fishermen have never been excluded from the fishing;

. . . moreover, it is shown as to Skjöttegrunde, the Norwegian fishermen have almost all the time, and in a manner relatively much more effectively than in Grisbadarna, engaged in the fishery for lobsters.⁵

For present purposes the features of interest in this award may be summarized as follows:

(1) The Tribunal was expressly authorized to apply a treaty; to the extent that the treaty did not determine the boundary, it was authorized to fix the boundary taking account of 'circumstances of fact' and the 'principles of international law'. The Tribunal considered that it was impliedly authorized to fix a line within the limits of the claims of the parties. It also considered that it was impliedly authorized to modify a boundary based on

¹ Wilson, *ibid.*, p. 129; Scott, *ibid.*, p. 130.

³ Wilson, *ibid.*, p. 129; Scott, *ibid.*, p. 131.

⁴ Wilson, *ibid.*, p. 131; Scott, *ibid.*, p. 131.

⁵ Wilson, *ibid.*, p. 133; Scott, *ibid.*, p. 132.

² *Ibid.*

the 'principles of international law' to take account of considerations of convenience and the interests of the respective parties and their nationals in the disputed area.

(2) The rules of international law applied explicitly by the Tribunal were those which it considered to have been prevalent in the seventeenth century. It is not clear from the award what justification the Tribunal had for assuming that the customary rule at that time was that the sea boundary should follow 'the general direction of the coast'. Clearly, the margin of discretion in determining the customary rules of an earlier period must be still greater than the latitude in determining the customs of the present day. It is worthy of note that the Court rejected the median line as the customary rule, although both parties agreed that this had been adopted in a treaty between them three years after the automatic delimitation of the boundary in accordance with customary rules. Unavoidably, there must be an element of fiction in such a decision. The line of the 'general direction of the coast' did, however, have certain advantages: it permitted the boundary to follow a course of compromise and divide the disputed territory. The median line claimed by Norway would have enclosed the Grisbadarna fishing banks within Norwegian territorial waters, and thereby deprived Sweden of a rich fishing ground which had been consistently exploited by Swedish fishermen for longer, and to a greater extent, than by Norwegians. Furthermore, the court rejected the *thalweg*, or most important channel, as the line of boundary.

Though the Tribunal expressly relied on rules of international customary law (albeit of the seventeenth century), it modified the application of these rules to take account of considerations of convenience (not cutting the fishing banks) and the interests of the parties. Furthermore, in support of its decision it referred to a variety of 'circumstances of fact'. Foremost amongst these were the private interests of Swedish fishermen in exploiting the Grisbadarna banks; their priority of appropriation and the greater economic value to the fishing communities on the Swedish side of the boundary than to the Norwegians. Another consideration was that Sweden had carried out certain improvements—placing of beacons, surveys, the stationing of a lightship—in the area in the belief that it was part of Swedish territory. Such considerations, especially the former, might well have led to the award of the whole of the disputed fishing banks to Sweden. The Skjöttegrunde were, however, awarded to Norway as 'the less important part of the disputed territory' which had been continuously fished by Norwegian fishermen, more continuously and effectively than had the Grisbadarna.

*North Atlantic Coast Fisheries case (United States v. Great Britain)*¹

The *North Atlantic Coast Fisheries* award, rendered by a five-man Tribunal of the Permanent Court of Arbitration in 1910 only incidentally concerned sovereignty over maritime territory. The dispute related to the interpretation of certain provisions of a Convention of 1818 between the two parties on the subject of the fisheries off the coasts of Newfoundland and Labrador. Article I provided for rights of fishing for inhabitants of the United States in certain areas and further provided that

. . . the United States hereby renounce forever, any Liberty heretofore enjoyed or claimed by the Inhabitants thereof, to take, dry, or cure fish on, or within three marine Miles of any of the Coasts, Bays, . . . of His Britannic Majesty's Dominions in America not included within the above-mentioned limits. . . .

The United States contended, *inter alia*, that the term 'bays' applied only to . . . bays six miles or less in width 'inter fauces terrae', those bays only being territorial bays, because the three mile rule is, as shown by this Treaty, a principle of international law applicable to coasts and should be strictly and systematically applied to bays.²

The Tribunal found itself unable to agree with this contention and gave, *inter alia*, the following reasons:

. . . the geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. Thus conditions of national and territorial integrity, of defence, of commerce and of industry are all vitally concerned with the control of the bays penetrating the national coast line. This interest varies, speaking generally in proportion to the penetration inland of the bay; but . . . no principle of international law recognises any specified relation between the concavity of the bay and the requirements for control by the territorial sovereignty. . . .³

In reply to a further contention by the United States that in the context of the Treaty the term 'bay' was intended to express and be equivalent to the word 'coast', the Tribunal said, *inter alia*,

. . . the Tribunal is unable to understand the term 'bays' in . . . other than its geographical sense, by which a bay is to be considered as an indentation of the coast, bearing a configuration of a particular character easy to determine specifically, but difficult to describe generally.

The negotiators of the Treaty of 1818 did probably not trouble themselves with subtle theories concerning the notion of 'bays' they most probably thought that everybody would know what was a bay. In this popular sense the term must be interpreted in the Treaty. The interpretation must take into account all the individual circumstances which for any one of the different bays are to be appreciated, the relation of

¹ Award (1910) in Wilson, *op. cit.* (above, p. 56 n. 1), p. 134; Scott, *op. cit.* (above, p. 56 n. 1), p. 141.

² Wilson, *ibid.*, p. 182; Scott, *ibid.*, p. 183.

³ Wilson, *ibid.*, p. 182; Scott, *ibid.*, pp. 183-4.

its width to the length of penetration inland, the possibility and the necessity of its being defended by the State in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate in general.¹

Thus, in summary, the Tribunal considered that the definition of a bay—and hence its inclusion within the internal waters and territory of a State—depended on geographical, strategic and economic criteria, and perhaps a variety of other considerations applicable to specific cases, but not susceptible of formulation in rigid rules of law.

*Gulf of Fonseca case (El Salvador v. Nicaragua)*²

The Central American Court of Justice applied very similar criteria to the determination of historic bays in the *Gulf of Fonseca* case to those applied in the *North Atlantic Coast Fisheries* case. This case only incidentally concerned title to sea areas, but the grounds on which the Court declared that the Gulf of Fonseca is 'a historic bay possessed of the characteristics of a closed sea'³ are of interest. The claim that it was a historic bay, and that the right of co-ownership—undivided by any delimitation of boundaries—was vested in the riparian States, was advanced by El Salvador on the basis of a number of historical, geographical and economic considerations.⁴ It was alleged that the gulf had been discovered by Spain in the sixteenth century, and had thenceforward been uncontestedly part of the dominions of Spain until the Central American States obtained independence. Subsequently, the ownership had been exercised exclusively by the riparian States—El Salvador, Honduras and Nicaragua—and the waters had never been used for fishing, etc., by any other State. The claim to co-ownership was based on the history of the ownership of the bay, and the contention that no effective boundary demarcation had ever been made after the independence of the riparian States.

In brief, the Court stated the criteria which it applied in the following terms:

In order to fix the international legal status of the Gulf of Fonseca it is necessary to specify the characteristics proper thereto from the threefold point of view of history, geography and the vital interests of the surrounding States.⁵

The Court then went on to examine the historical and geographical considerations and the 'vital interests' of the riparian States in detail. The history of the gulf showed that the administrative authorities of the surrounding area—whether the Spanish provincial authorities or the successor

¹ Wilson, *The Hague Arbitration Cases*, p. 186; Scott, *The Hague Court Reports*, p. 187.

² *American Journal of International Law*, 11 (1917), p. 674.

³ *Ibid.*, p. 693.

⁴ *Ibid.*, pp. 677–80.

⁵ *Ibid.*, p. 700.

independent States surrounding the gulf—had asserted dominion over the gulf, and that this had met with general acquiescence. As to the relevant geographical considerations, the award remarks that with respect to the surrounding territories both the gulf and its archipelago were

... a necessary dependency thereof for geographical reasons and purposes of common defence (for) ... nature had indented (the Gulf) in that important part of the continent, in the form of a gullet.¹

The 'vital interests' guarded by the gulf were detailed as, in particular, its commercial value as one of the best ports along the Pacific coast, and its general geographical position. Furthermore, the Court listed other factors which it regarded as still more decisively imparting to the gulf the character of a historic bay. These included the following: railways, existing and projected, leading from Honduran, Nicaraguan and El Salvadorean ports on the gulf to the interiors of those States. The establishment of a free port by El Salvador on one of the islands of the gulf.² Furthermore:

The Gulf is surrounded by various and extensive departments of the three riparian countries. These are of great importance because they are destined to great commercial, industrial and agricultural development; their products, like those of the departments in the interior of those States, must be exported by way of the Gulf of Fonseca, and through that Gulf must come also the increasing importations.

The configuration and other conditions of the Gulf facilitate the enforcement of fiscal laws and regulations and guarantee the full collection of imposts against frauds against the fiscal laws.

The strategic situation of the Gulf and its islands is so advantageous and the riparian States can defend their great interests therein and provide for the defense of their independence and sovereignty.³

The Court summarized the criteria which it considered applicable to the determination of 'historic bays' in the following terms:

(T)he Gulf of Fonseca belongs to the special category of historic bays and is the exclusive property of El Salvador, Honduras and Nicaragua ... on the theory that it combines all the characteristics or conditions that the text writers on international law, the international law institutes and the precedents have prescribed as essential to territorial waters, to wit, secular or immemorial possession accompanied by *animo domini* both peaceful and continuous and by acquiescence on the part of other nations, the special geographical configuration that safeguards so many interests of vital importance to the economic, commercial, agricultural and industrial life of the riparian States and the absolute, indispensable necessity that those States should possess the Gulf as fully as required by those primordial interests and the interest of national defense.⁴

The Court emphasized that its decision was based on the decision of the *North Atlantic Coast Fisheries* case, and in particular on the views of Dr. Drago, one of the judges in that arbitration.⁵

¹ Ibid., p. 700.

² Ibid., pp. 701-5.

³ Ibid., pp. 704-5.

⁴ Ibid., p. 705.

⁵ Ibid., pp. 707-9.

*Anglo-Norwegian Fisheries case (United Kingdom v. Norway)*¹

The facts of this case are well known. The dispute was between the United Kingdom and Norway and related essentially to the extent of the exclusive fishing zone claimed by Norway about its coasts. This zone, a four-mile belt, was not regarded by the United Kingdom as excessive because of its breadth, but because of the method of delimitation involving drawing straight base-lines of considerable length in certain areas of rock and island-fringed, deeply indented coast. Since the four-mile zone was measured from these base-lines, a considerable sea area was enclosed within Norwegian internal waters which would otherwise have been territorial waters; and a further area was included within the fishing zone which would otherwise have been high seas.

The United Kingdom application asked the Court:

... to declare the principles of international law to be applied in defining the base-lines, by reference to which the Norwegian Government is entitled to delimit a fisheries zone, extending to seaward 4 sea miles from those lines and exclusively reserved for its own nationals, and to define the said base-lines in so far as it appears necessary, in the light of the arguments of the Parties, in order to avoid further legal differences between them.²

Thus, in effect, the United Kingdom requested the Court to declare the principles of international law to be applied in determining sovereignty and exclusive rights over maritime areas adjacent to the coast, and the criteria to be applied in delimiting the boundaries of state sovereignty over maritime areas.

The parties approached the problem very differently. The United Kingdom case was highly traditional: it sought to establish the existence of rigid and definite rules of customary law, modified only by certain equally well-defined exceptions. It was argued, that the customary rule required base-lines to be drawn following the sinuosities of the coast; the only exceptions to this rule were founded in the acquiescence of the international community, as in the exceptional ten-mile closing line admitted for bays, and the further exception, again depending on acquiescence, of historic bays, and historic titles to other maritime areas.³

The Norwegian approach was more novel, and it was largely followed by the Court in its judgment. It emphasized that the development of the law of the sea showed a historical process of adjustment of the conflicting interests of coastal States and users of the seas in general. The general modern trend had been against the coastal States, admittedly, with the gradual admission of the concept of the high seas as a *res communis*, and the

¹ *I.C.J. Reports*, 1951, p. 116.

² *Ibid.*, pp. 118-19.

³ See, e.g., United Kingdom Memorial, *Pleadings*, vol. 1, pp. 55 et seq.; Reply, *ibid.*, vol. 2, pp. 391 et seq.

gradual desuetude of the large claims once made to extensive areas of maritime territory. But it was argued that this very trend created a presumption in favour of reasonable claims by coastal States. Furthermore, it was pointed out that there was a recent trend in the opposite direction, now that it had been recognized that the resources of the ocean and its bed were not inexhaustible. This trend was evidenced by the rapid development of the legal concept of the continental shelf and the lack of unanimity on the question of the breadth of the territorial sea. In the Norwegian view the evidence of customary rules as to the direction and length of base-lines put forward by the United Kingdom was not evidence of rigid rules and exceptions to them; rather did these rules demonstrate the diversity of application to different geographical circumstances of certain overriding principles. One of these principles was the concept of adjacent maritime areas as appurtenant to the land: consequently the base-lines from which these sea areas were measured must in general follow the general line of the coast. The second was the concept of reasonableness—in the light of all the circumstances—of the coastal States' claims to exclusive rights in adjacent waters. In testing the validity of any such claim, the legitimate interests of the coastal State must be taken account of, together with the interests of users of the seas in general. The legitimacy of those interests might be tested by an international tribunal, or evidenced by the acquiescence of States in general.¹

The 'legitimate interests' alleged by Norway were to be found in the preamble to the Norwegian decree which was the subject of the dispute. This refers to 'well-established national titles of right', 'the geographical conditions prevailing on the Norwegian coasts' and the safeguarding of 'the vital interests of the inhabitants of the northernmost parts of the country'. The legitimate interests invoked were thus historical—the continuous and prior exploitation of the sea areas for fishing by Norwegian fishermen; the peculiar geographical characteristics of the coastal area, in which sea and land areas closely interpenetrated; and the economic and social interests of the inhabitants of the coast in the fishing in adjacent waters.

The judgment of the Court largely adopted the Norwegian approach. First, the Court held that the Norwegian system of drawing base-lines had 'not violated international law'.² In doing so, the Court did not accept the rules invoked by the United Kingdom as having the status of customary law. Thus, it took the view that the alleged rule that base-lines should follow the 'sinuosities' of the coast was merely a reflection of the general principle that 'the belt of territorial waters must follow the general direction

¹ See, e.g., Norwegian Counter-Memorial, *ibid.*, vol. 1, pp. 342 et seq.; *Duplique*, *ibid.*, vol. 2, pp. 229 et seq.

² *I.C.J. Reports*, 1951, p. 132.

of the coast'.¹ The application of that fundamental principle—itself apparently derived from the concept of 'territorial waters as appurtenant to the land territory'²—depended on the geographical realities of a particular coast-line.³ Similarly, the Court found no foundation for the contention that straight base-lines might only be drawn across bays,⁴ and must not in any case (with the exception of historic bays) exceed ten miles in length.⁵ Again, the Court emphasized that the application of any alleged rule must be tested against geographical realities and 'local conditions'.⁶ It had decided that the line from which the territorial waters must be measured was the *skaergaard*—a rock and island fringe along the coast—on the grounds that this was 'dictated by geographic realities'.⁷ For in effect 'the *skaergaard* . . . constitutes a whole with the mainland'.⁸ Consequently:

If the belt of territorial waters must follow the outer line of the 'skaergaard', and if the method of straight base-lines must be admitted in certain cases, there is no valid reason to draw them only across bays, . . . and not also to draw them between islands, islets and rocks, across the sea areas separating them, even when such areas do not fall within the conception of a bay. It is sufficient that they should be situated between the island formations of the 'skaergaard', *inter fauces terrarum*.⁹

The Court further found that there was no sufficiently uniform acceptance of the ten-mile rule alleged by the United Kingdom to give it 'the authority of a general rule of international law'.¹⁰ Furthermore, 'in any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast'.¹¹ Having thus disposed of the rules of customary law invoked by the United Kingdom, the Court turned to consider what it regarded as the correct principles to which any unilateral delimitation of sea areas must conform.

The principles discussed by the Court did not constitute rigid rules but rather, as the Court put it, 'criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question'.¹² The Court derived these criteria from 'certain basic considerations inherent in the nature of the territorial sea, . . .'.¹³

The judgment lists three major considerations: first, 'the close dependence of the territorial sea upon the land domain'. From this consideration, the Court stated that:

It follows that while . . . a State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast.¹⁴

¹ *I.C.J. Reports*, 1951, p. 129.

⁴ *Ibid.*, p. 130.

⁷ *Ibid.*, p. 128.

¹⁰ *Ibid.*, p. 131.

¹³ *Ibid.*

² *Ibid.*, p. 128.

⁵ *Ibid.*, p. 131.

⁸ *Ibid.*

¹¹ *Ibid.*

³ *Ibid.*

⁶ *Ibid.*, pp. 128, 131.

⁹ *Ibid.*, p. 130.

¹² *Ibid.*, p. 133.

¹⁴ *Ibid.*

A second 'fundamental consideration'—and one described as 'of particular importance in this case'—was 'the more or less close relationship existing between certain sea areas and the land formations which divide or surround them'.¹ For, in the Court's view,

The real question raised in the choice of base-lines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters. This idea, which is at the basis of the determination of the rules relating to bays, should be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway.²

The third consideration was the amalgam of economic and historic interests of the coastal region in its adjacent waters: 'certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by long usage'.³ The Court thereupon held that the Norwegian base-lines conformed to these principles.⁴ Moreover, they had been acquiesced in by other States.⁵

One characteristic of this judgment—so frequent in territorial and boundary cases—is the lack of assistance found in rules of customary law. The only customary rule invoked by the United Kingdom which the Court found it possible to accept was that the breadth of the territorial sea should be measured from low- (as opposed to high-) water mark. And on this rule at least the parties were agreed! The judgment is unusual, not in basing itself on the weighing and adjustment of interests of the parties, rather than on precise rules, but in attempting to construct a framework of principle from what might otherwise be thought of simply as the equities of a particular case. The reason for this is obvious: the Court was not simply deciding a dispute between two parties, but charged with the interpretation and application of allegedly general rules of law. It could not be unaware of the general interest in its decision. It was deciding on the principles of delimitation of boundaries between State territory and a *res communis*, not on the boundaries between two particular States. The Court could have decided the case on more particular grounds: historic title or acquiescence.⁶ Instead, it boldly swept aside rigid customary rules, to expose the fundamental principles upon which the attribution of sovereignty over territory is based. It is worthy of emphasis that the criteria which the Court applied as criteria of international law were geographical, economic, social and historical—exactly those criteria which have been found to have been applied, explicitly or implicitly, in other territorial and boundary awards. In that context, however, they have usually been described as 'equities' only.⁷

¹ Ibid.

² Ibid.

³ Ibid.; see also p. 142.

⁴ Ibid., p. 139.

⁵ Ibid., p. 138.

⁶ Cf. Fitzmaurice, 'Judicial Innovation, its Uses and its Perils', in *Cambridge Essays in International Law*, p. 24, esp. at pp. 39 et seq.

⁷ The Court's approach was of course formulated in general terms in Art. 4 of the Geneva Convention on the Territorial Sea and the Contiguous Zone without reference to any notion of

Apart from the judgment of the Court, the individual and dissenting opinions are of considerable interest. A conservative approach based on the premiss of the existence of rigid rules of law is expressed in the opinions of Judges Read¹ and McNair.² They were unwilling even to permit exceptions from the rules which they enunciated in application to the unusual geographical characteristics of the area in question. For the geography of the area, although unusual, was not unique. Judge McNair further emphasized that private interests, and economic interests in general, should not be taken into consideration in claims relating to the delimitation of the territorial sea.³ Judge Hsu Mo also took a relatively conservative approach: he agreed with the decision of the majority, but emphasized that this was specifically on the grounds that the Norwegian geographical conditions were 'special', and her consistent practice had been 'acquiesced in by the international community as a whole'.⁴

The most interesting observations are to be found in the opinion of Judge Alvarez.⁵ It lays down a series of fourteen principles relevant to 'the maritime domain and, in particular, the territorial sea'. Basically, these refer to the need to weigh the interests of the coastal States with 'the general interest': claims made by coastal States must meet the standard of 'reasonableness'. If they do not do so, they constitute '*abus de droit*'. In effect, his formulation generalizes, in broader terms and with general application for the delimitation of the territorial sea, the criteria applied specifically by the Court to the drawing of base-lines.⁶

'equity', nor did the Court refer to 'equity' in its judgment. The point made here is that tribunals and writers often rely on 'equity' as an amorphous 'hold-all' for considerations which can—by detailed formulation—be made more 'objective' and 'law-like' (see Conclusions below for a formulation, in general terms, of the criteria applied in the awards considered here). Cf. the I.C.J.'s approach in the *North Sea Continental Shelf* cases (below, p. 81) again listing criteria for an 'equitable' solution, which could be given detailed formulation in a rule as precise as that laid down in Art. 4, and of Alvarez's formulation, below, p. 68.

¹ *I.C.J. Reports*, 1951, pp. 186 et seq.

² *Ibid.*, pp. 158 et seq.

³ *Ibid.*, p. 161; see also Hsu Mo, p. 157.

⁴ *Ibid.*, p. 154.

⁵ *Ibid.*, pp. 145 et seq.

⁶ See especially *ibid.*, pp. 150–1, where he says:

'1. Having regard to the great variety of the geographical and economic conditions of States, it is not possible to lay down uniform rules, applicable to all, governing the extent of the territorial sea and the way in which it is to be reckoned.

'2. Each State may therefore determine the extent of its territorial sea and the way in which it is to be reckoned, provided it does so in a reasonable manner, that it is capable of exercising supervision over the zone in question and of carrying out the duties imposed by international law, that it does not infringe rights acquired by other States, that it does no harm to general interests and does not constitute an *abus de droit*.'

'In fixing the breadth of its territorial sea, the State must indicate the reasons, geographic, economic, etc., which provide the justification therefor.

'In the light of this principle, it is no longer necessary to debate questions of base-lines, straight lines, closing lines of ten sea miles for bays, etc. as has been done in this case.

'Similarly, if a State adopts too great a breadth for its territorial sea, having regard to its land territory and to the needs of its population, or if the base-lines which it indicates appear to be arbitrarily selected, that will constitute an *abus de droit*. . . .

'9. Similarly, for the great bays and straits, there can be no uniform rules. The international

IV. THE ATTRIBUTION OF SOVEREIGNTY OVER AREAS *SUI GENERIS*

Certain areas the subject of territorial or boundary disputes raise peculiar problems owing to their anomalous character. An example is the Rann of Kutch, a seasonally flooded marsh, the subject of a boundary dispute between India and Pakistan. According to Judge Lagergren, the Chairman of the Arbitral Tribunal:

The question whether the Rann on the whole is most closely akin to land or to what Pakistan has termed a 'marine feature', has no decisive bearing on the issues in the case. For the purpose of this opinion, it needs only to be observed that the Rann is a unique geographical phenomenon.¹

The Rann of Kutch, however, is not the only area of territory which presents unique problems and cannot usefully be treated as analogous to land or sea. One can instance territory which is neither one nor the other—such as air and outer space—in which quite different criteria for the attribution of sovereignty may be appropriate. Sometimes land and sea may be closely intermingled, as in a deeply indented and island-fringed coastline or an archipelago. Territory may partake of some of the characteristics of both land and sea: permanent ice, for example. Areas, though technically sea, may be more appropriately assimilated to neighbouring land: bays perhaps offer an example of this. Inland seas and lakes, and river boundaries and straits have their own peculiar characteristics and require individual solutions. Areas which are technically land, such as the continental shelf and the ocean bed, are so very different from land in their characteristics and the type of activities of which they admit, that they demand very different criteria for the attribution of sovereignty, and can only sensibly be treated as areas *sui generis*. The *North Sea Continental Shelf* case affords an example of such treatment. Polar regions afford another example; and

status of every great bay and strait must be determined by the coastal States directly concerned, having regard to the general interest.²

¹ Conclusions (Opinion of the Chairman), *The Indo-Pakistan Western Boundary* (cited in full below, p. 70 n. 1), p. 107. It is not altogether clear what was intended by this statement. Whether a disputed area is to be treated as land or water must always be of some significance: it is this character that sets appropriate criteria for the attribution of sovereignty. In the absence of any overwhelming exercise of jurisdiction by one party, different geographical characteristics of an area suggest diverse presumptions. For example, if a land area forms a geographical unity, and a State claims sovereignty over the whole but effectively exercises jurisdiction over only a part, then the presumption would appear to be that sovereignty over the whole area must be attributed to that State (see the *Legal Status of Eastern Greenland* case, *P.C.I.J.*, Series A/B, No. 53). A similar presumption does not appear in relation to water areas, where the median line—either as a customary rule or a reflection of the most likely equitable division—tends to be favoured. The consequence of the implied rejection of the argument that the Rann was most aptly characterized as a 'marine feature' was therefore the rejection of the possible presumption in favour of the applicability of the principles of the median line and the 'nearness of shores'. Cf. also Judge Koretsky in *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, p. 161.

largely uninhabited land may even be allocated to claimants on the basis of criteria more usually applied to water: the median line was applied in the *Brazil-British Guiana boundary* case. Although they cannot afford rules directly applicable to different circumstances, it is suggested that the *Rann of Kutch* award and the *North Sea* case exemplify the approach of international tribunals to novel facts, and the criteria developed by them in relation to the individual case.

Rann of Kutch arbitration (*India v. Pakistan*)¹

This dispute between India and Pakistan concerned the boundary between West Pakistan and Gujarat. It was referred to arbitration under an agreement between the Governments of the two countries concluded on 30 June 1965. This Agreement provided for a cease-fire to end the hostilities which had broken out between the two countries in April 1965, and to restore the *status quo* at 1 January 1965. It further provided procedures for the determination and demarcation of the boundary in the disputed area: first, a meeting of Ministers of the two Governments 'to agree on the determination of the border in the light of their respective claims, and the arrangements for its demarcation'; second, if no agreement were reached on the determination of the boundary within two months of the cease-fire, the dispute was to be referred to the final and binding decision of an arbitral tribunal.² The meeting of Ministers did not take place and the two Governments referred the dispute to the Tribunal.³

The Agreement provided for a three-man Tribunal, none to be nationals of either party, although one member was to be nominated by each Government. The third member, who was to be the Chairman, was to be selected jointly by the two Governments; if they failed to agree, they were to request the Secretary-General of the United Nations to nominate him.⁴ The Government of India nominated as member of the Tribunal Ambassador Aleš Bebler, Judge of the Constitutional Court of Yugoslavia, and the Government of Pakistan nominated Ambassador Nasrollah Entezam, an Iranian and former President of the General Assembly of the United Nations. The two Governments failed to agree on a Chairman, and the Secretary-General of the United Nations nominated Judge Gunnar Lagergren, President of the Court of Appeal for Western Sweden.⁵

The Agreement made no explicit provision as to the law to be applied by the Tribunal. It simply provided that the Tribunal determine the border

¹ *The Indo-Pakistan Western-Boundary Case Tribunal (Constituted pursuant to the Agreement of 3 June 1965) Award, 19 February 1968* (Introduction, Conclusions, and Three Maps), Government of India Press (1968) (cited as *Award* in the notes, below). The Introduction to the award, with excerpts from the opinions of the three arbitrators, is reproduced in *International Legal Materials*, 7 (May 1968), pp. 633 et seq.

² Art. 3.

³ *Award*, p. 4.

⁴ Agreement, Art. 3 (iii).

⁵ *Award*, p. 4.

'in the light of their [the two Governments'] respective claims and evidence produced before it'.¹ The question arose whether the Tribunal had the power to decide the case *ex aequo et bono*:² Pakistan contended that it had, India that it had not. At the request of India this was determined by the Tribunal as a preliminary question. The Tribunal did not find that the Agreement authorized it 'clearly and beyond doubt to adjudicate *ex aequo et bono*'.³ Since the parties had not conferred the power to adjudicate *ex aequo et bono* on the Tribunal by any subsequent agreement the Tribunal resolved that it did not have such power.⁴ However, the Tribunal pointed out that both parties were agreed that equity forms part of international law; 'therefore, the Parties are free to present and develop their cases with reliance on principles of equity'.⁵ The power to adjudicate *ex aequo et bono*, however, was, the Tribunal considered, a 'wider power . . . to go outside the bounds of law'. An international tribunal would have this power 'only if such power had been conferred on it by mutual agreement between the Parties'.⁶

The arguments of the parties are summarized in the award.⁷ In effect, the parties were claiming as successors of the States of Sind on the Pakistan side of the Rann, and Kutch on the Indian side. One of the peculiarities of the case was, as already mentioned, the character of the Rann itself: whether it was most akin to land or was, as Pakistan put it, a 'marine feature'. The submissions of Pakistan were as follows:

(a) that during and also before the British period, Sind extended to the south into the Great Rann up to its middle and at all relevant times exercised effective and exclusive control over the northern half of the Great Rann;

(b) that the Rann is a 'marine feature' (used for want of a standard term to cover the different aspects of the Rann). It is a separating entity lying between the States abutting upon it. It is governed by the principles of the median line and of equitable distribution, the 'bets' in the Rann being governed by the principle of the 'nearness of shores';

(c) that the whole width of the Rann (without being a condominium) formed a broad belt of boundary between territories on opposite sides; that the question of reducing this wide boundary to a widthless line, though raised, has never been decided; that such widthless line would run through the middle of the Rann and that the Tribunal should determine the said line.⁸

The submission that Sind had exercised 'effective and exclusive control over the northern half of the Rann' was founded on a broad historical trend

¹ Agreement, Art. 3 (ii).

³ Decision of 23 February 1966; see *Award*, § 7.

⁶ *Ibid.*, § 6.

⁷ *Ibid.*, pp. 9 et seq.

² *Award*, pp. 8-9.

⁴ *Ibid.*, § 8.

⁵ *Ibid.*, § 5.

⁸ *Ibid.*, p. 13.

of expansion of Sind control from the sixth century onwards, manifesting itself in invasions, and garrisoning of the area during part of the eighteenth century. Pakistan argued that the Rulers of Sind had manifested effective control and dominion over the Rann by their ability to cross it. These activities were stopped in 1816 by the advance of the British army, and, so Pakistan contended, the territorial extent of Kutch froze in 1819 when it entered into treaty relationships with Britain: consequently, the task of the Tribunal was to determine the extent of the sovereignty of Kutch in 1819. Pakistan further relied on statements by officials in the Sind administration during the period of British control to the effect either that the Rann itself was the boundary, or that the boundary lay in the middle of the Rann, and that the question of the boundary between Sind and the Indian States had never been solved. With regard to the British and post-independence period, the evidence on which Pakistan relied to show the exercise of Sind (or British) or Pakistan jurisdiction was primarily acts of private individuals—cultivation, fishing and grazing. Special importance was attached to grazing in Chhad Bet, Dhara Banni and Pirol Valo Kun: in these areas it was alleged that grazing had been protected by the British authorities and was of vital interest to the inhabitants of the Sind coast.¹ With regard to the period since independence, the evidence of exercise of jurisdiction was alleged to constitute a prolongation of the situation existing during the independent Sind and British periods,² and also as an independent source of title: nine years' 'continuous and peaceful display of State functions' (from 1947 to 1956).³ Furthermore, it was alleged that India had recognized in part the Pakistan claim in 1955.⁴

India, on the other hand, contended that the boundary ran roughly along the northern edge of the Rann;⁵ this was the boundary shown in pre-partition maps, and was the 'traditional, well-established and well-recognised boundary' which had, in the course of time, become 'crystallised and consolidated'. It had been 'acknowledged, recognised, admitted and acquiesced in by the Paramount Power'.⁶ In particular, a part of the boundary had been explicitly settled—and the rest impliedly confirmed—by a resolution of the Government of Bombay in 1914.⁷ India argued that the possessions of the Rao of Kutch in the first part of the eighteenth century had extended to the north of the Rann, necessarily implying that the Rann was within Kutch territory; that in Annual Administration Reports for over seventy-five years the assertion that the Rann was Kutch territory had been made, and these assertions had been acquiesced in by the British Governmental authorities; that the British Government had

¹ *Award*, pp. 19–20.

⁴ *Ibid.*

⁷ *Ibid.*

² *Ibid.*, p. 14.

⁵ *Ibid.*, p. 13.

³ *Ibid.*, p. 23.

⁶ *Ibid.*, p. 14.

positively recognized in official publications and correspondence that the entire Rann belonged to Kutch, and that maps since 1871, prepared and published by the Survey of India, had consistently shown the northern edge of the Rann as the conterminous Sind–Kutch boundary.¹

Both parties were agreed that the Tribunal was free to determine as the boundary a line different from the claims of either party.²

A further matter of dispute between the parties was the law to be applied by the Tribunal. Both parties were of course agreed that to events since the date of independence (15 August 1947) international law should be applied; and that similarly, international law should be applied to relationships between Kutch and other neighbouring Indian States and Sind during the period up to the conquest of Sind by the British in 1843. But difficulty was found in the period between 1843 and 1947, and in the relations between the British Government and Kutch from 1819. For Kutch was a vassal State of the Paramount Power, being under British suzerainty, and from 1843 Britain was, as sovereign of Sind, the neighbour of its own vassals. This question was of importance in the context of the question of ‘acquiescence’. Pakistan argued that the relations between Britain and the Indian States were not governed by international law, and there could therefore be no question of acquiescence, or even of recognition—even treaty engagements were actually unilateral. India contended that even if the application of international law had been at the option of the Paramount Power, this fact could not be relied on by Pakistan, which had not inherited the principle of paramountcy. Furthermore, recognition and acquiescence were, in the circumstances of the case, matters of evidence rather than exclusively matters of international law. In fact, India relied on a version of the *uti possidetis* principle:

On principle the proper thing is to say that the frontier was that which at that time (15 August 1947) the father country or the mother country acknowledged to be the frontier and it is right that that frontier should continue, unless there was something very striking at the time of partition or subsequent thereto which requires positively that it should be treated otherwise.³

Another difficulty which arose was over the authority of the Tribunal to apply principles of ‘equity’.⁴ India contended that the determination of where the boundary was was a question of fact: principles of equity could only be applied to mitigate hardship resulting from law, not fact. Principles of equity might be invoked in assessing evidence perhaps. In any case, given the acquiescence and recognition by the British Government of the boundary claimed by India, the successor of that Government could not as a matter of equity be allowed to deny what its predecessor had maintained.⁵

¹ Ibid., p. 16.

² Ibid., p. 14.

³ Ibid., pp. 24–5.

⁴ See above, p. 71.

⁵ Award, pp. 25–6.

Pakistan argued that since the Tribunal had ruled that equity formed part of the international law to be applied, the alignment of the boundary must be tested by principles of equity. In particular, it would be repugnant to equity and good conscience, and create an untenable situation, to allow India to encroach upon Pakistan at the inlets of the Thar Parkar sector of the Rann with fortifications or customs houses.¹

The award of the Tribunal was not unanimous: the majority was formed by the Chairman of the Tribunal (Gunnar Lagergren) and the nominee of Pakistan (Nasrollah Entezam). The Indian nominee (Aleš Bebler) gave a strong dissenting opinion in favour of the Indian claim. The majority awarded the greater part of the territory to India, while awarding to Pakistan the sectors of major interest to that State. The reasoning of the award, in which the nominee of Pakistan concurred, is found in the opinion of the Chairman of the Tribunal, Judge Lagergren. In Judge Lagergren's opinion, the Tribunal was required to resolve three main issues:

The first is whether the boundary in dispute is a historically recognised and well-established boundary. Both Parties submit that the boundary as claimed by each of them is of such a character.

The second main issue is whether Great Britain, acting either as territorial sovereign, or a Paramount Power, must be held by its conduct to have recognised, accepted or acquiesced in the claim of Kutch that the Rann was Kutch territory, thereby precluding or estopping Pakistan, as successor of Sind and thus of the territorial sovereign rights of Great Britain in the region, from successfully claiming any part of the disputed territory. One question which arises in considering this issue is the true meaning of 'the Rann' in the context of related documents.

The third main issue is whether the British Administration in Sind and superior British authorities, acting not as Paramount Power but as territorial sovereigns performed acts, directly or indirectly, in assertion of rights of territorial sovereignty over the disputed tract which were of such a character as to be sufficient in law to confer title to the territory, or parts thereof, upon Sind, and thereby upon its successor, Pakistan, or, conversely, whether such exercise of sovereignty on the part of Kutch and the other States abutting upon the Great Rann, to whose rights India is successor, would instead operate to confer title on India to the territory, or to parts thereof.²

A preliminary issue was the 'critical date' for the determination of these three main issues. In the Chairman's view, the parties were not agreed on any one particular date for the application of the *uti possidetis* principle. However:

It is true that one important element of a notion of this kind is common ground and therefore binds the Tribunal, *viz.* the agreement between the Parties that the boundary between India and Pakistan is a conterminous boundary and that the disputed territory must therefore belong to one or the other of them and cannot belong to any third party.³

¹ *Award*, p. 26.

² *Ibid.*

³ *Award* (Conclusions), p. 108.

Nevertheless, 'it does not necessarily follow from this proposition . . . that the territory cannot at any relevant time have had an undefined status'.¹ Consequently '[this] territorial dispute . . . does not differ in essence from other like disputes in which opposing claims have been made in reliance upon conflicting testimony, and where a judgment has to be rendered on the relative strength of the cases made out by two parties'.² Although there was no agreed 'critical date', several dates had 'particular relevance': in particular, two dates, the 13 October 1819, when the East India Company concluded the last of three treaties with the Rulers of Kutch; and the date of independence, 15 August 1947.³ Thus the Chairman did not select any one 'critical date', being ready rather to treat both 1819 and 1947 as 'relevant', and admitting evidence of acts even after that date as relevant on some ground at least, although not decisive.⁴

With regard to the first main issue, the Chairman took the view that in 1819 the boundaries in the Rann had not been determined and the Rann in fact formed a broad belt of frontier territory.⁵ He found no conclusive evidence either way for the period between 1819 and 1871, and finally concluded that 'there did not exist at any time relevant in these proceedings a historically recognised and well-established boundary in the disputed

¹ Ibid.

² Ibid. See also p. 145: ' . . . The dispute is one of great complexity. It is also one in which the claims and the evidence adduced in support of them are in respect of certain parts of the territory at issue almost evenly balanced. The ultimate determination therefore is both difficult and in exceptional measure dictated by considerations which do not heavily outweigh those considerations that would have motivated a different solution.'

³ *Award* (Conclusions), pp. 108-9. The Chairman said:

'One such date is 13 October 1819, when the East India Company concluded the last of the three treaties with the Rulers of Kutch. Both Parties submit that the boundary of Kutch has remained unchanged since the Treaty of 1819 . . . India, however, maintains that the boundary after 1819 may have become crystallised and consolidated.'

'Both Parties have developed their cases with primary reference to and in reliance on evidence relating to the long period of British rule on the sub-continent. The attitudes and actions of the British Government both as Suzerain Power and as territorial sovereign at various times during this epoch have on each issue been deemed by both Parties to be of crucial significance. For that reason, the date of Independence is of decisive importance.'

'With regard to the period after 1947, the main difference between the Parties' cases is that Pakistan relies upon certain acts of jurisdiction as constituting additional independent sources of title to the disputed territory, while India denies that they are of such character.'

'Pakistan, at a late stage in the proceedings, introduced the argument that the rights claimed by Pakistan are those of the people of the Muslim unit which was conquered by the British in 1843 and then, as it were, restored to the Moslem State of Pakistan in 1947. According to this submission, Sind would have been held in trust by the British Government in a capacity of territorial sovereign incapable of acting as such, while Sind itself would have been a fettered sovereign possessing latent territorial rights; the dispositions of Great Britain during the century of its administration of Sind would in such an eventuality be without effect in this case . . . While the principle of which it is an illustration is of interest, application of such a principle would be difficult and would introduce an element of instability in the relationships between nations which for a long time have been under foreign domination.'

⁴ Compare Bebler, who described 1947 (the various Independence, etc., dates) as the 'critical date' (ibid., p. 3) and Entezam, who described 1819 as the 'relevant date' (ibid., p. 79).

⁵ *Award* (Conclusions), pp. 113-14.

region'.¹ Judge Lagergren then explained the basis for the determination of the boundary:

(T)he conclusion that a recognised and well-established boundary did not exist in the disputed region east of the Western Trijunction on the eve of Independence . . . does not in the context of this case imply that the disputed territory was a *terra nullius*. According to the joint submissions of the Parties, the Rann of Kutch in modern times could only have formed part of the territory of a sovereign whose territory abutted upon it. Since the Rann until recently has been deemed incapable of permanent occupation, the requirement of possession cannot play the same important role in determining sovereign rights therein as it would have done otherwise. Therefore, special significance must be accorded to display of other State activities and the attitudes expressed or implied by one or several of the sovereign entities abutting upon the Rann in regard to the actual extension of their respective dominions.

. . . (T)he overall general principle that would apply during the British epoch in determining issues turning upon notions of territorial sovereignty was usage.²

This 'usage', in Lagergren's approach, involved a combination of the evidence relevant to the second and third main issues—in legal terms, recognition, acquiescence, estoppel and the exercise of territorial sovereignty. The most significant evidence of usage was Kutch administrative reports in which incidental assertions that Kutch territory included the Rann were made by the Ruler; *Bombay Gazetteers* in which similar assertions were made; and survey of India maps showing the boundary as claimed now by India—all this for a period of about seventy-five years preceding independence. On the other side were statements during the same period by British officials in Sind favourable to the Pakistan claim. With respect to the former, Judge Lagergren observed that they:

. . . constitute acts of competent British authorities which—if viewed as being in response to claims by Kutch or other Indian States that the Rann was Indian State territory—may be interpreted as acquiescence in, or acceptance of, such claims, and which—if viewed as unilateral, administrative acts not prompted by such representa-

¹ There were, however, two relatively small areas to which sovereignty had, the Chairman held, been determined. The first was the 'Sayra lands' an area originally populated and part of Kutch territory, which were submerged in an earthquake in 1819. Pakistan had argued that sovereignty over Sayra lapsed when it was destroyed. The Chairman observed: 'Had Sayra been an island in the high seas, this argument might have been cogent. The transformation of a territory from cultivable land to a lake, or to a swamp, marsh or desert, cannot, however, by itself affect established sovereign rights over it.'

In addition, a portion of the boundary between Kutch and Sind, to the west of the present area in dispute, had been demarcated in 1924 in pursuance of a 'boundary award' made in 1914 by Resolution of the Government of Bombay. This line ran to what was termed in this case the 'Western Terminus'. Furthermore, at the request of the ruler of Kutch, a further stretch of boundary, lying in a vertical line north from the 'Western Terminus' was demarcated at the same time by the demarcation commission. This line did not form part of the original Resolution, but the Chairman found it to have been accepted by both the Ruler of Kutch and the British authorities in Sind as the Kutch-Sind boundary.

² *Ibid.*, p. 145. In this context, it may be noted that the Chairman did not accept the applicability of a 'regional custom' asserted by Pakistan to have been applied generally to territorial disputes in the area by the British: a combination of the 'median line' and the determination of sovereignty over the 'bets' on the basis of 'nearness of shores' (*ibid.*).

tions—may amount to a voluntary relinquishment, whether conscious or inadvertent, of British territorial rights in the Rann.

The absence of a demonstrable connection between representations of the Rao of Kutch or rulers of other neighbouring Indian States and the British administrative acts in question leads me to conclude that the acts constituted a relinquishment of potential rights rather than the explicit acceptance of claimed rights. Hence, it may be argued that, being in the nature of unilateral acts conferring the benefits upon a third party, as it were, of grace, or by policy and not as of right, the actions should be restrictively interpreted in favour of the conceding party and its successor in title. An important guiding factor in a determination of the precise legal effects of the relevant administrative acts would then be whether and to what extent the third party beneficiary acted in reliance upon them, or remained passive.¹

With respect to the latter, he said:

The statements . . . made subsequent to 1903 emanated from rather subordinate officials . . . who had [however] direct and intimate knowledge of actual conditions and of locally recognised boundary conceptions. At the same juncture of history, the acknowledgments in various forms by higher British authorities to the effect that the Rann of Kutch was Kutch territory began to appear. Taken as statements, if unaccompanied by any action, the pronouncements to the effect that the boundary lay in the middle of the Rann . . . or in dispute or not settled, cannot outweigh the evidence to the opposite effect upon which India's claim rests. . . . (T)hey weaken but cannot invalidate India's claim.²

Although Judge Lagergren treated this evidence rather as creating and rebutting presumptions than as creating estoppels one way or the other, Judge Bebler did, following the *Temple* case and, in particular, Judge Alfaro's separate opinion in that case, regard the first group of acts as creating an estoppel against the British authorities binding on Pakistan.³ It is therefore perhaps apposite to note Entezam's contrary observations which emphasize the difficulties of applying concepts of estoppel in such cases.⁴ It is, indeed, a general difficulty of applying concepts of 'estoppel'

¹ Ibid., p. 135.

² Ibid., pp. 150-1.

³ *Award* (Conclusions), pp. 22 et seq.

⁴ Ibid., p. 98. 'Since I am not a lawyer by training, the technicalities of estoppel, as discussed by the Parties, are mostly beyond my depth. As a matter of common sense, however, one thing seems clear to me. If some British officials said that the Rann belonged to Kutch, and others said it was "no man's land", and still others exercised jurisdiction in half of it on behalf of Sind, and still others apportioned parts of it between different coastal states; if the Administration Reports of Kutch saying that the whole of the 9000 square miles of the Rann belonged to Kutch, and the administration reports of some of the other coastal States saying that a part of those 9000 square miles belonged to one or the other of those coastal States were left equally uncontradicted; if one Gazetteer gave the area of Kutch 'exclusive of the Rann' and another 'exclusive of a portion of the Rann'; if in spite of the absence of any reservation as to the Rann in respect of the area of a coastal State, a portion of the Rann did admittedly belong to that State; if statistical abstracts, without reservation relating to the area of a State owning a part of the Rann, were laid before Parliament along with those of Kutch with a reservation; then which of these mutually inconsistent positions are the British supposed to have acquiesced in and which of them is to be taken to be the one in relation to which they are supposed to be estopped? Another thing that to my lay mind seems clear is that what is expressed in deeds corresponds far more accurately to what is in the mind than what is expressed merely in words. In the diplomatic field . . . that would seem obvious. Even more obvious to me is that silence of a political officer is hardly ever equivalent to assent. . . .'

and 'acquiescence' to States, that they rarely, especially in territorial matters, speak with one voice.

With regard to the third question, Judge Lagergren first stated his views generally as to the problem of attributing sovereignty over the area in dispute:

Territorial sovereignty implies, as observed by Judge Huber in the *Island of Palmas* case, certain exclusive rights which have as their corollary certain duties. In adjudging conflicting claims by rival sovereigns to a territory, all available evidence relating to the exercise of such rights, and to the discharge of such duties, must be carefully evaluated with a view to establishing in whom the conglomerate of sovereign functions has exclusively or predominantly vested.

The rights and duties which by law and custom are inherent in, and characteristic of, sovereignty present considerable variations in different circumstances according to time and place, and in the context of various political systems. The sovereign entities relevant in this case prior to independence were, on both sides of the Rann, agricultural societies. The activities and functions of Government—leaving aside the military organisation—were in their essence identical in Sind and Kutch, being limited mainly to the imposition of customs duties and taxes on land, livestock and agricultural produce in the fiscal sphere, and to the maintenance of peace and order by police and civil and criminal courts and other law enforcement agencies in the general public sphere.

In these societies . . . the borders between territories under different sovereignty still marked a strict division of economic rights as well as of Government functions. Significantly, ownership by an Indian ruler of agricultural property could imply and carry with it such a measure of sovereignty over it as to include taxing authority, and civil and criminal jurisdiction. . . .

Because of the close dependence of the taxation system on the land and the agricultural production even in Sind, State and private interests coincided and were necessarily so closely assimilated with each other that it would be improper to draw as sharp a distinction between them as is called for in the context of a modern industrial economy. The sole important revenue, apart from customs duties, derived from the land, and was earmarked for the State and the landholder in fixed proportions.

It is in the light of these facts and circumstances that the evidence relating to acts of 'jurisdiction' in the northern half of the Rann has to be analysed. The object of such an appraisal is to define and delimit with the greatest possible accuracy which of the two contending sovereigns . . . in actual fact enjoyed the rights of sovereignty over the disputed territory, and which of them carried the burden of discharging the duties inherent in sovereignty in that territory at each relevant period of time . . .

The principal evidence of facts of sovereignty in the disputed territory falls into four categories, *viz.* customs, police surveillance and police jurisdiction, criminal jurisdiction, and the material relating to Dhara Banni and Chhad Bet. . . .¹

Interesting parts of this statement are the reference to the question 'in whom the conglomerate of sovereign functions has exclusively or *predominantly* vested'; and the line of reasoning directed to permitting private (or community) grazing and agricultural interests to be taken into account.

¹ *Award (Conclusions)*, pp. 135-6, 674-5.

In the area of the northern sector outside Dhara Banni and Chhad Bet, Judge Lagergren found that:

In this century, prior to independence . . . the police and criminal jurisdiction of Sind authorities over disputed territory extended, in the sector between the eastern loop and Dhara Banni, to Ding, Vighokot and Biar Bet. There is, however, no evidence which affirmatively proves in a conclusive fashion that the jurisdiction of Sind police and Sind courts encompassed areas west of the eastern loop, or east of Chhad Bet. Conversely, no proof is offered that Kutch either assumed or exercised such jurisdiction over any part of the disputed territory.¹

With regard to Dhara Banni and Chhad Bet, the President found that 'for well over one hundred years, the sole benefits which could be derived from these areas were enjoyed by inhabitants of Sind'.² There was also some evidence that the maintenance of law and order was undertaken by Sind—and certainly not by Kutch. Registration of births, deaths and epidemics was made in Sind. Kutch did, however, collect, or attempt to collect, grazing fees in the period before 1845 and after 1927. However,

. . . at no time were these tax levies fully effective, as is evidenced by the small amounts recovered, which fell far short of the expenditure incurred in the collection. More significantly, . . . the imposition of the levy was opposed, not only by the local villagers, but by the British Government authorities concerned . . . Taken in all, these activities by Kutch cannot be deemed to have constituted continuous and effective exercise of jurisdiction. By contrast, the presence of Sind in Dhara Banni and Chhad Bet comes as close to effective peaceful possession and display of Sind authority as may be expected in the circumstances. Both the inhabitants of Sind who used the grazing grounds, and the Sind authorities, must have acted on the assumption that Dhara Banni and Chhad Bet were British territory.³

The President drew the following conclusions from these circumstances. The maps produced by the survey of India from 1907 onwards were the strongest evidence in favour of the Indian claim, since they consistently showed a conterminous boundary which conformed by and large to India's claim. But they were not 'a conclusive and authoritative source of title to territory' so much as 'a rather tentative indication of the actual extension of sovereign territorial rights'. The evidence of Pakistan, that at the time these maps were being produced statements were made by Sind authorities that half of the Great Rann was British territory, 'cannot outweigh the evidence to the opposite effect' on which the Indian claim was based.⁴ He therefore concluded:

Reviewing and appraising the combined strength of the evidence relied upon by each side as proof or indication of the extent of its respective sovereignty in the region, and comparing the relative weight of such evidence, I conclude as follows. In respect of those sectors of the Rann in relation to which no specific evidence in the way of display

¹ Ibid., p. 676.

² Ibid., pp. 144, 677.

³ Ibid., pp. 677-8.

⁴ Ibid., p. 688.

of Sind authority, or merely trivial or isolated evidence of such a character, supports Pakistan's claim, I pronounce in favour of India. These sectors comprise about ninety per cent of the disputed territory. However, in respect of sectors where a continuous and for the region intensive Sind activity, meeting with no effective opposition from the Kutch side, is established, I am of the opinion that Pakistan has made out a better and superior title. This refers to a marginal area south of Rahim ki Bazar, including Pirol Valo Kun, as well as to Dhara Banni and Chhad Bet, which on most maps appears as an extension of the mainland of Sind.¹

An explicit application of principles of 'equity' was made with regard to the two deep inlets on either side of Nagar Parkar:

... it would be inequitable to recognise these inlets as foreign territory. It would be conducive to friction and conflict. The paramount consideration of promoting peace and stability in this region compels the recognition and confirmation that this territory, which is wholly surrounded by Pakistan territory, also be regarded as such.²

This award has a number of interesting features: having found that there was no 'historically recognised and well-established boundary' in the Rann, the majority decision turned on the weighing of a variety of considerations and activities of the parties, their predecessors and their subjects in the Rann. Actions were considered in so far as they might constitute recognition or acquiescence, estopping either party from its claims, and establishing in which party 'the conglomerate of sovereign functions has exclusively or predominantly vested'. In establishing the latter, considerable reliance was placed on activities of private individuals, subjects of Sind and subsequently Pakistan, in the area—in particular, grazing. Although the reason for this was expressly given as the peculiarities of government and sovereignty in the area, it does in fact coincide with the general approach of tribunals to boundaries in other areas. A further aspect of interest is the treatment of maps as evidence of the boundary: here a more flexible approach than that adopted by the International Court of Justice in the *Temple* case is revealed (cf. also the *Argentine–Chile* award). The boundary described on the maps—virtually uniformly in favour of the Indian claim—was treated as establishing a presumption in favour of that line, rebuttable by evidence of Sind (Pakistan) sovereignty in specific areas.

The award does not conform to the claims of either party: in effect, it is another example of a compromise. But this apparent compromise results from a weighing of the relative interests of each party in different parts of the disputed territory, and its links with the area.

The award is also noteworthy for the explicit acknowledgement that equity forms part of international law, and that consequently the parties might rely on principles of equity in their claims. A distinction was made between this power to take into account equitable principles and the power

¹ *Award* (Conclusions), p. 690.

² *Ibid.*, p. 692.

to adjudicate *ex aequo et bono*. It is not, however, obvious that a different decision would—in the absence of a ‘historically recognised and well-established boundary’—have been reached by a tribunal empowered to adjudicate *ex aequo et bono*. The reasoning of the majority decision is not based on any clear principles of law. Explicit reference to equity as a basis of decision is made in regard to only one part of the boundary: the two deep inlets on either side of Nagar Parkar. Here the principles of equity are equated with ‘the paramount considerations of promoting peace and stability’ in the region. This phraseology recalls that of the General Assembly resolution on Eritrea: ‘The interests of peace and security in East Africa’; and is yet further evidence of the ‘political’ character of ‘equity’ in boundary and territorial disputes.

*North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*¹

These cases concerned disputes between the Federal Republic and the Netherlands and Denmark over the boundaries of their respective submarine areas beneath the North Sea. The Federal Republic concluded agreements with Denmark and the Netherlands delimiting the boundaries near the coast—up to points 55° 10' 03.4" N, 7° 33' 09.6" E and 54° N, 6° 06' 26" E respectively—in 1964 and 1965. These boundaries were delimited on the basis of the equidistance method set out in Article 6 (2) of the Geneva Convention on the Continental Shelf. Denmark and the Netherlands contended that the whole of the continental shelf boundaries both between themselves and the Federal Republic should be delimited on the basis of the median line and equidistance methods described in Article 6. The Federal Republic considered that such delimitations would be inequitable to the Federal Republic because of its concave coastline. Thereupon, on 31 March 1966 Denmark and the Netherlands concluded an agreement delimiting the boundary as between themselves: this agreement necessarily assumed that the areas claimed by the two States were coterminous and that the entire Denmark/Federal Republic and Federal Republic/the Netherlands boundaries were delimited by the equidistance method.

On 2 February 1967 the three Governments signed two Special Agreements for the submission to the International Court of Justice of the question:

What principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundaries determined by the Conventions of 1964 and 1965? ²

¹ *I.C.J. Reports*, 1969, p. 3.

² Art. I (1).

The three Governments further agreed to ask the Court to join the two cases and to 'delimit the continental shelf in the North Sea as between their countries by agreement in pursuance of the decision requested from the International Court of Justice'.¹

In substance the case of Denmark and the Netherlands was that delimitation was governed 'by the principles and rules of international law which are expressed in Article 6, paragraph 2, of the Geneva Convention of 1958 on the Continental Shelf'.² They contended that since the Parties were in disagreement,³ and 'special circumstances which justify another boundary line [had] not . . . been established, the boundary between the Parties is to be determined by application of the principle of equidistance . . .'.⁴ The Federal Republic had not ratified the Continental Shelf Convention; Denmark and the Netherlands contended, however, that the Federal Republic was bound by Article 6 (2) by reason of having accepted it by its conduct, or because the median line and equidistance rules set out in Article 6 represented at their inception or had subsequently become customary international law.⁵ An alternative basis for delimitation by the equidistance method was contended for in what the Court described as 'what might be called the natural law of the continental shelf'.⁶

. . . the boundary is to be determined between the Parties on the basis of the exclusive rights of each Party over the continental shelf adjacent to its coast and of the principle that the boundary is to leave to each Party every point of the continental shelf which lies nearer to its coast than to the coast of the other Party.⁷

The Federal Republic on the other hand contended that the equidistance method was not a rule of customary international law;⁸ that even if the rule in Article 6 (2) were applicable between the parties 'special circumstances within the meaning of that rule would exclude the application of the equidistance method in the present case';⁹ that '. . . the equidistance method cannot be used for the delimitation of the continental shelf unless it is established by agreement, arbitration, or otherwise, that it will achieve a just and equitable apportionment of the continental shelf among the States concerned';¹⁰ and that in the case of the particular boundaries in dispute, Denmark and the Netherlands could not rely on the application

¹ Art. 1 (2).

² *I.C.J. Reports*, 1969, Final Submission, No. 1. Art. 6 (2) provides: 'Where the same continental shelf is adjacent to the territories of two adjacent states, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each state is measured.'

³ *Ibid.*, No. 2.

⁴ *Ibid.*, No. 3.

⁵ *Ibid.*, pp. 23-46.

⁶ *Ibid.*, pp. 28-9.

⁷ *Ibid.*, Final Submission, No. 4.

⁸ *Ibid.*, Nos. 2 (a) and (b).

⁹ *Ibid.*, No. 2 (c).

¹⁰ *Ibid.*, No. 3 (a).

of the equidistance method 'since it would not lead to an equitable apportionment'.¹ On the positive side, the Federal Republic contended that

... the delimitation of the continental shelf between the Parties in the North Sea is governed by the principle that each coastal State is entitled to a just and equitable share ... based on criteria relevant to the particular geographical situation in the North Sea.²

The arguments of the parties and, as will be seen, the judgment of the Court, demonstrate the close interrelationship between the bases on which territory is acquired or attributed and its delimitation,³ and the importance for both of the geographical background. For the Court rejected the Danish/Netherlands arguments that the 'equidistance/special circumstances' mode of delimitation prescribed in Article 6 of the Continental Shelf Convention was opposable to the Federal Republic—either as such (by reason of acceptance by conduct, recognition or estoppel), or as representing, or having become, a rule of general or customary international law.⁴ Consequently the remaining opposing contentions of the parties related essentially to whether rules or principles of delimitation of boundaries could be derived of necessity from the principles on which the continental shelf was attributed to coastal States—that is, from what the Court described as 'the natural law of the continental shelf'.

The Federal Republic, although agreeing that the submarine areas of the North Sea constituted 'continental shelf within the meaning of Article 1 of the Continental Shelf Convention', considered that the North Sea formed a 'special case' because 'its submarine areas constitute a single continental shelf which must be divided up among the surrounding coastal States in its entirety' as distinct from 'areas where the continental shelf constitutes but a narrow belt off the coast'. In this situation, where 'by virtue of their geographic position', two or more coastal States can claim that a continental shelf appertains to each of them, 'the necessity arises of apportioning that common continental shelf between them. . . . The problem of division which poses itself . . . is a problem of "distributive justice" (*justitia distributiva*). If goods or resources which are held in common by several parties by virtue of the same right have to be divided up between these parties, it is a recognised principle in law that each of these parties is entitled to a just and equitable share which is to be meted out in accordance with an appropriate standard equally applicable to all of them. This principle . . . *the principle of the just and equitable share*, is a basic legal principle emanating from the concept of distributive justice and a generally recognised principle inherent in all legal systems, including the legal system of the international community.'⁵

¹ Ibid., No. 3 (b).

² Ibid., Nos. 1 and 4.

³ See esp. Separate Opinion of Judge Ammoun, *ibid.*, pp. 101 et seq.

⁴ Ibid., pp. 23–46.

⁵ *I.C.J. Reports*, 1969; Memorial of the Federal Republic, §§ 30–1.

Thus the Federal Republic asserted, in essence, that the submarine areas of the North Sea were owned in common with the co-riparian States. Moreover, the 'appropriate standard' according to which it was to be apportioned was primarily the length of North Sea coastline, measured, not following its curves and indentations but rather by its 'coastal frontage'—'the degree of the natural connection of the land territory with the submarine areas adjoining the coast'.¹ Other factors mentioned, but not emphasized, included the position of navigable channels, historical, economic and technical factors 'in particular . . . the geographical distribution of the mineral resources of the continental shelf and . . . the maintenance of the unity of their deposits' and the Federal Republic's economic needs (with reference to population, industrialization, power supply and exploitation capacity). But with respect to the first group it was stated that 'up to now no such particular factors are ascertainable which would have to be taken into account'; and with respect to the latter group, 'Germany does not wish to base its claim on these considerations'.² In its pleadings, but not in its formal submissions, the Federal Republic offered alternative specific methods of delimitation to give effect to the principle of the 'just and equitable share': it was suggested that delimitation be founded on what were in effect, straight base-lines drawn across the extremities of the German North Sea coastline (between the islands of Borkum and Sylt)—the German 'coastal frontage'; and on the 'sector principle': 'in an apportionment of maritime areas which are surrounded by a number of States, it would be an equitable principle of division for every coastal State to receive a portion which extended to the middle of the sea'.³ This 'sector principle' was of course derived by analogy from the delimitation of claims to polar areas where the convenience of delimitation by degrees of longitude is obvious. Its application to what is merely a more or less oval, semi-enclosed sea clearly rests on more tenuous grounds.

Denmark and the Netherlands contended, on the other hand, that Article 1 of the Continental Shelf Convention represented customary international law in so far as it declared that 'adjacent' submarine areas appertained *ipso facto* by reason of their 'adjacency' to the coastal State. From the principle of appurtenance on the basis of adjacency could then be derived the following principle of delimitation: that those areas appertained to a State which were 'adjacent' in the sense of being in 'closer proximity' to that State than to any other. Only the equidistance method could effect such delimitation and, in the view of Denmark and the Netherlands, this was therefore a mandatory rule inherent in the concept of the continental shelf.⁴

¹ *I.C.J. Reports*, 1969; Memorial of the Federal Republic, § 69.

³ *Ibid.*, § 81.

² *Ibid.*, § 79.

⁴ *Ibid.*, Judgment, p. 29.

The Court did not accept the contention of Denmark and the Netherlands that 'adjacency' must be identified with 'proximity'. It found the terminology generally used in State claims (such as 'adjacent', 'near', 'close', 'contiguous', etc.) to be 'of a somewhat imprecise character' and, in particular, that there was 'no necessary, and certainly no complete, identity between the notions of adjacency and proximity'.¹ Rather 'the notion of adjacency . . . only implies proximity in a general sense, and does not imply any fundamental or inherent rule the ultimate effect of which would be to prohibit any State (otherwise than by agreement) from exercising continental shelf rights in respect of areas closer to the coast of another State'.²

The Court found the more fundamental basis of States' rights over the continental shelf in the notions of 'prolongation', 'continuation' or 'extension' of a State's land domain. It said:

More fundamental than the notion of proximity appears to be the principle—constantly relied on by all the Parties—of the natural prolongation or continuation of the land territory or domain, or land sovereignty of the coastal State, into and under the high seas, via the bed of its territorial sea which is under the full sovereignty of that State. There are various ways of formulating this principle, but the underlying idea, namely of an extension of something already possessed, is the same, and it is this idea of extension which is, in the Court's opinion, determinant. Submarine areas do not really appertain to the coastal State because—or not only because—they are near it. They are near it of course; but this would not suffice to confer title any more than, according to a well-established principle of law recognized by both sides in the present case, mere proximity confers *per se* title to land territory. What confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion—in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea. From this it would follow that whenever a given submarine area does not constitute a natural—or the most natural—extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State;—or at least it cannot be so regarded in the face of a competing claim by a State of whose land territory the submarine area concerned is to be regarded as a natural extension, even if it is less close to it.³

Consequently, the Court did not accept that the equidistance method, although possessing a 'combination of practical convenience and certainty of application',⁴ formed part of 'the natural law of the continental shelf' for

. . . the use of the equidistance method would frequently cause areas which are the natural prolongation or extension of the territory of one State to be attributed to another, when the configuration of the latter's coast makes the equidistance line swing

¹ Ibid., p. 30.

² Ibid., pp. 30–1.

³ Ibid., p. 31.

⁴ Ibid., p. 23.

out laterally across the former's coastal front, cutting it off from areas situated directly before that front.¹ [As in the case of the German North Sea Coast.]

The Court did not, however, find it possible to accept the contentions of the Federal Republic 'at least in the particular form they have taken'.² It said:

... having regard both to the language of the Special Agreements and to more general considerations of law relating to the regime of the continental shelf, its task in the present proceedings relates essentially to the delimitation and not the apportionment of the areas concerned, or their division into converging sectors.³

The Court went on to define what it understood by the term 'delimitation':

Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area. Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area, even though in a number of cases the results may be comparable, or even identical.⁴

In the Court's view, not only was the notion of 'equitable apportionment' inconsistent with that of 'delimitation' referred to in the Special Agreements, but also:

More important is the fact that the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it, namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in the exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right.⁵

Consequently, in the Court's view:

... even in such a situation as that of the North Sea, the notion of apportioning an as yet undelimited area, considered as a whole (which underlies the doctrine of the just and equitable share), is quite foreign to, and inconsistent with, the basic concept of continental shelf entitlement, according to which the process of delimitation is essentially one of drawing a boundary line between areas which already appertain to one or other of the States affected ... the fundamental concept involved does not admit of there being anything undivided to share out.⁶

The Court was here adopting certain arguments put forward by Denmark and the Netherlands on the nature of the determination of boundary disputes,⁷ and it went on to put this view in more general terms:

Evidently any dispute about boundaries must involve that there is a disputed marginal or fringe area, to which both parties are laying claim, so that any delimitation

¹ *I.C.J. Reports*, 1969, pp. 31-2. Compare the Dissenting Opinions of Judge Tanaka, pp. 172 et seq. and Judge Morelli, pp. 197 et seq.

² *Ibid.*, p. 21.

³ *Ibid.*, p. 22.

⁴ *Ibid.*

⁵ *Ibid.*, p. 23.

⁶ *Ibid.*

⁷ *Ibid.*, Common Rejoinder, §§ 15-16.

of it which does not leave it wholly to one of the parties will in practice divide it between them in certain shares, or operate as if such a division had been made. But this does not mean that there has been an apportionment of something that previously consisted of an integral, still less an undivided whole.¹

It may be useful to consider further this distinction between 'delimitation' and 'apportionment', particularly in relation to the task of the Court. It has been suggested that the history of a boundary can be analysed into four stages: 'allocation' of territory, 'delimitation' (verbal definition of the boundary), 'demarcation' (the marking out of the boundary on the ground) and 'administration'.² Now the Court in these cases was requested to decide the 'principles and rules of international law . . . applicable to the delimitation' of the boundaries in dispute. It was not, as the Court itself noted,³ required to 'delimit' the boundary. The arguments of the parties, as has been seen above, related both to the bases of the attribution of the continental shelf (allocation of territory), and to particular technical methods of delimitation (definition of the boundary by equidistance lines, sectors, etc.). Thus the Court's was a compound task, relating both to the 'allocation' and 'delimitation' stages, and it is, therefore, possible to disagree with the view that the concept of 'apportionment' (which seems to have been used by the Federal Republic to draw analogies from the notions of equitable apportionment of natural resources—rivers, etc.—but might better have been termed 'allocation') was outside the Court's task.⁴ 'Apportionment' or 'allocation' of territory were no more incompatible with the 'inherent right' of States in their adjacent continental shelves than was, say, the allocation of territory in the *Minquiers and Ecrehos* or the *Guiana Boundary* cases in which it was agreed that the territory in dispute must be allocated to one or other party.

Although the Court did not accept the rules put forward by Denmark and the Netherlands as customary international law, it did find broader rules of customary international law in the practice of States in making claims to submarine areas, namely, 'that delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles'.⁵ In the Court's view, 'the ideas which have always underlain the development of the legal regime of the continental shelf in this field' were:

(a) the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation

¹ Ibid., Judgment, p. 23.

² Jones, *op. cit.* (above, p. 21 n. 7), p. 57. See below, p. 114.

³ *I.C.J. Reports*, 1969, p. 46.

⁴ Cf. *ibid.*, Judge Morelli, pp. 211–12.

⁵ Ibid., p. 46. See, for the Court's reasons, pp. 32–6 (citing, *inter alia*, the Truman Proclamation to which it attached particular importance).

as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case where either of them insists upon its own position without contemplating any modification of it;

(b) the parties are under an obligation to act in such a way that, in the particular case, and taking all the circumstances into account, equitable principles are applied—for this purpose the equidistance method can be used, but other methods exist and may be employed, alone or in combination, according to the areas involved;

(c) . . . the continental shelf of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State.¹

In the present context, the most interesting feature of this statement is the prescription of the application of 'equitable principles' to delimitation, and the 'circumstances' to be taken into account.

The Court had found the basis for the application of 'equitable principles' in the practice of States—in particular in the formal claims to continental shelf areas such as the Truman Proclamation and its successors, and in the work of the International Law Commission, but in face of the objection raised by Denmark and the Netherlands that the Federal Republic, in calling for the application of 'equity' by the Court, was in effect asking for adjudication *ex aequo et bono*, the Court was forced to draw a distinction between the two. It said:

Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles. There is consequently no question in this case of any decision *ex aequo et bono*, such as would only be possible under the conditions prescribed by Article 38, paragraph 2, of the Court's Statute.²

The distinction is clearly a very fine one, for it would be possible to say that in any situation—including all territorial and boundary disputes—the customary rules of international law required the application of 'equity'. The Court indeed referred to the problem of assessing compensation for injury in the *I.L.O. Administrative Tribunal*³ and *Corfu Channel* cases (as setting precedents).⁴

The Court went on to point out the circumstances in which the application of the equidistance method 'leads unquestionably to inequity':

(a) The slightest irregularity in a coastline is automatically magnified by the equidistance line as regards the consequences for the delimitation of the continental shelf. Thus it has been seen that in the case of concave or convex coastlines that if the equidistance method is employed, then the greater the irregularity and the further from

¹ *I.C.J. Reports*, 1969, p. 47.

³ *I.C.J. Reports*, 1956, p. 100.

² *Ibid.*, p. 48.

⁴ *I.C.J. Reports*, 1949, p. 249.

the coastline the area to be delimited, the more unreasonable are the results produced. So great an exaggeration of the consequences of a natural geographical feature must be remedied or compensated for as far as possible, being of itself creative of inequity.

(b) In the case of the North Sea in particular, where there is no outer boundary to the continental shelf, it happens that the claims of several States converge, meet and intercross in localities where, despite their distance from the coast, the bed of the sea still unquestionably consists of continental shelf. A study of these convergences, . . . shows how inequitable would be the apparent simplification brought about by a delimitation which, ignoring such geographical circumstances, was based solely on the equidistance method.¹

The Court then went on to state what, in its view, were the considerations of equity to be applied:

Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy. But in the present case there are three States whose North Sea coastlines are in fact comparable in length and which, therefore, have been given broadly equal treatment by nature except that the configuration of one of the coastlines would, if the equidistance method is used, deny to one of these States treatment equal to or comparable to that given the other two. Here indeed is a case where, in a theoretical situation of equality within the same order, an inequity is created. . . . It is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result.²

But although the Court laid major stress (as of course had the Federal Republic) on the criterion of coastal length, it also noted that

. . . in fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.³

It seems, therefore, clear that non-geographical considerations might well reasonably be taken account of in the name of 'equity': one need only recall the significance attached to socio-economic factors in the *Anglo-Norwegian Fisheries* case. It is perhaps unfortunate that the problem raised by all the equities—on the side of Denmark and the Netherlands also—was not examined in this case.⁴ Thus the Court in listing the factors to be taken

¹ *I.C.J. Reports*, 1969, p. 49.

² *Ibid.*, pp. 49–50.

³ *Ibid.*, p. 50.

⁴ The Federal Republic mentioned them but avoided reliance on them; *ibid.*, Memorial, § 7a. The equities in favour of Denmark and the Netherlands were touched on very lightly by Sir Humphrey Waldock (11 November 1968, *ibid.*, Verbatim Record, pp 32–5). For a discussion

account of by the parties noted only the 'geology' of the continental shelf, that is, its 'configurational features' which might 'point-up' the notion of the appurtenance of the continental shelf to a particular State, the 'geographical configuration' of the coastline, the 'unity of any deposits' and coastline length. As summarized in the *dispositif*, the Court stated:

(1) delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other;

(2) if . . . the delimitation leaves to the Parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally, unless they decide on a regime of joint jurisdiction, user, or exploitation for the zones of overlap or any part of them;

(D) in the course of the negotiations, the factors to be taken into account are to include:

(1) the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;

(2) so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved;

(3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region.¹

The noteworthy features of this case for present purposes are the following:

1. The great significance attached to geographical and geomorphological factors. One may, however, query the correctness of the Court's emphasis on the legal necessity for the continental shelf to be a 'natural prolongation' of the land domain of the claimant State. Claims to the continental shelf and submarine areas have not been in such unambiguous terms and an area might reasonably be described as 'adjacent' without being a continuation of the mainland.² Moreover, the contention of the Federal Republic that areas surrounded by a group of States formed a special case for 'apportionment' and delimitation may well appear more reasonable than the concept offered by the Court of overlapping or converging natural prolongations. In this context it is noteworthy that for such cases the Court suggested

of the influence of oil and gas resources see the Separate Opinion of Judge Jessup, pp. 67 et seq. (and, in particular, on the influence of concessions already granted, see pp. 79-81); see also Dissenting Opinion of Judge Lachs, at p. 239.

¹ *I.C.J. Reports*, 1969, pp. 53-4.

² For a distinction between 'contiguous' and 'adjacent' areas see, e.g., Australian Pearl Fisheries Act, 1952-1953, S. 5 (5) (*U.N. Legislative Series, Laws and Regulations on the Regime of the High Seas*, Supplement, p. 4).

division 'in agreed proportions' or 'equally': the contention of the Federal Republic might have been put similarly in terms that the entire continental shelf of the North Sea formed a 'natural prolongation' of the land domains of each coastal State, and therefore required division on a similar basis. It is also noteworthy that the Court, not accepting the applicability of the 'equidistance/special circumstances rule', approached the question on a broad basis of 'equity', while certain judges who regarded the 'equidistance/special circumstances rule' as a rule of customary international law, came to a substantially similar conclusion in favour of the Federal Republic by regarding the configuration of the German North Sea coast, or the North Sea as an entity, as a 'special circumstance' within the meaning of that rule.¹

2. Another feature of importance is the rejection by the majority of the Court of any rigid rule of delimitation such as the 'equidistance' rule as part of customary international law. It may be recalled that Judge Bebler in the *Rann of Kutch* case similarly declared that the 'median' line, in application to lake and sea areas, was not a mandatory rule of international law.

3. It is, moreover, of interest that the Court felt able to apply as the basis of its decision principles of 'equity' overtly, although it had not been authorized to adjudicate *ex aequo et bono*. In such a case the distinction between adjudication *ex aequo et bono* and the application of 'equity' as being directed by a rule of law becomes remarkably fine. However, it is noteworthy that in the *Anglo-Norwegian Fisheries* case the Court found it possible to take account of geographical and socio-economic considerations in its judgment (and these same considerations were subsequently formulated in Article 4 of the Geneva Convention on the Territorial Sea and the Contiguous Zone) without reference to considerations of 'equity' at all.

CONCLUSIONS

This exploration of the practice of international adjudication seems to warrant the formulation, at least tentatively, of the following conclusions.

(i) *Specific directions to tribunals are frequently inadequate*

International tribunals frequently find the rules which they may have been directed to apply inadequate to resolve the particular dispute referred to them. Thus, for example, the provisions of treaties, awards or legislation which purport to delimit a boundary may be found to be ambiguous, inconclusive or incomplete.²

¹ See, e.g., Separate Opinion of Judge Padilla Nervo, *I.C.J. Reports*, 1969, pp. 85 et seq.; Separate Opinion of Judge Ammoun, pp. 148 et seq.; Dissenting Opinion of Judge Morelli, pp. 197 et seq.

² For treaties, see in Section II: *Cordillera of the Andes Boundary* case; *Chamizal* award. In Section III: *Grisbadarna* case. For awards, see in Section II: *Argentine-Chile Frontier* case. For

Professor Kelsen has this to say about the process of interpretation:

The function of authentic interpretation is not to determine the true meaning of the legal norm thus interpreted, but to render binding one of the several meanings of a legal norm, all equally possible from a logical point of view. The choice of interpretations as a law-making act is determined by political motives. . . .¹

Granted, then, that interpretation is 'a law-making act' of 'giving a meaning to the text',² it is sometimes still suggested that there are, or ought to be, restrictions on the evidence which may be considered. Since there are no exclusionary rules of evidence in international law, discussion whether this or that item (such as *travaux préparatoires*)³ should or should not be referred to, might be thought mere pedantry. Attempts have, however, been made to list the types of evidence to which recourse may be had. The *Harvard Draft* provides that:

A treaty is to be interpreted in the light of the general purpose which it is intended to serve. The historical background of the treaty, *travaux préparatoires*, the circumstances of the parties at the time the treaty was entered into, the change in the circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purposes which the treaty is intended to serve.⁴

Clearly, in substance this simply means that the treaty must be interpreted in the light of all the evidence, relating to the periods before, during and after the conclusion of the treaty, which may be offered by the parties. Indeed, this approach is followed in a more recent statement of the factors to be taken into account in the process of interpretation: the *American Law Institute Restatement* lists nine factors to be considered, and adds: 'There is no established priority as between the factors indicated . . . or as between them and additional factors not listed.'⁵ It may be suggested, however, that in the context of specific types of dispute, the factors considered can be given more concrete form, and, indeed, priorities may be assigned to them. The factors particularly important in boundary and territorial problems have already been listed, and the priorities assigned them by international tribunals are discussed below.

The most significant problems of interpretation which have arisen in practice have related to events subsequent to the document—treaty, award or legislation—to be interpreted. In particular, administrative practices

legislation, see in Section II, *Honduras-Nicaragua* and *Honduras Borders* (for *uti possidetis*) and the *Meerauge* award.

¹ *The Law of the United Nations*, p. xv.

² *Harvard Research Draft on the Law of Treaties*, p. 946.

³ The *Island of Timor* case, *R.I.A.A.*, vol. 11, p. 481, affords one example where the *travaux préparatoires* were probably decisive.

⁴ Art. 19. Cf. Vienna Convention on the Law of Treaties, Arts. 31 and 32.

⁵ Section 147.

may have developed—perhaps diverging at central and local government levels—and previously unpopulated areas may become populated.¹ It is, of course, generally admitted that a treaty may be modified or even terminated by a development of practice or change of circumstances subsequent to its conclusion.² This may be done explicitly by agreement of the parties, or it may be done implicitly by a tribunal applying concepts, for example, of acquiescence, preclusion (or estoppel). There is the possibility of the application of the *clausula rebus sic stantibus*; but this controversial concept, though applied in the practice of States either to modify or terminate obligations, has been avoided by judicial tribunals. Its function can often effectively and more circumspectly be fulfilled by the concepts of acquiescence and preclusion.

Tribunals have also had difficulty in applying certain specific criteria: in particular, that of *uti possidetis*.³ The reasons for this are clearly explained and exemplified in the *Honduras Borders* case. Like any historical criterion—treaties and awards, since they purport to ‘freeze’ a situation at a particular date may be thought of as historical criteria—it suffers the defect of being difficult to elucidate at a later date, and also, perhaps, of not corresponding to the requirements of the situation of fact at the date when its application is questioned. Moreover, there has been the problem—also arising in the application of treaties and awards—of inadequate knowledge of the geographical circumstances at the date of the decrees relied on, and the fact that territory—frequently unexplored—may never have been under any effective administration.⁴

It is almost unnecessary to point out the inadequacy and inappropriateness of the formulations of rules of customary international law traditionally offered. That the traditional modes of acquiring State territory—discovery, occupation, prescription, accretion, cession and subjugation (or conquest)—together with their corresponding modes of losing State territory are

¹ See the *Argentine–Chile Frontier* case in Section II (above, p. 33 n. 2). Cf. the *Frontier Land* case, *I.C.J. Reports*, 1959, p. 209.

² The inevitable and proper tendency to take account of events, etc., subsequent to the relevant treaty, award, *uti possidetis* date, etc. (albeit under the guise of an aid to establishing the situation at the earlier date) indicates the artificiality of the ‘critical date’ concept as elaborated by Fitzmaurice, this *Year Book*, 32 (1955–6), pp. 20–44. Cf. Jennings, *op. cit.* (above, p. 20 n. 2), pp. 31–5.

³ See above, p. 22. See especially the comments of Lapradelle, *La Frontière*, pp. 76–87. *Uti possidetis* could be described as a form of ‘critical date’ with a general application—but it seems no more useful to describe it thus than, say, a treaty of cession. Indeed, the legal notion behind the application of *uti possidetis* to actually determining the course of a boundary (as distinct from using the concept simply to exclude ‘occupation’ and colonization—a form of Monroe Doctrine) is, in a sense that sovereignty was ceded by the former sovereign. The point is, that the very concept of a rigid ‘critical date’ is not found useful in deciding disputes—yet if the date is left flexible it probably serves no purpose at all. See, e.g., the *Argentine–Chile Frontier* case (above, p. 33 n. 2), pp. 68–9.

⁴ See the *Cordillera of the Andes Boundary* and *Honduras–Nicaragua* cases, also the *British Guiana Boundary* case, *R.I.A.A.*, vol. 11, p. 11.

insufficient to do more than provide theoretical explanations of the holding of unchallenged territory has been demonstrated frequently in the examples given above.¹ Thus, 'prescription' is of a very doubtful status²—and in the only case in which a definition was laid down in the *compromis* it was not explicitly applied.³ Definitions of 'occupation' by tribunals have had to be progressively attenuated to meet the problem that 'acts of sovereignty' are frequently exiguous—until the concept may now be said to have been effectively and gratefully jettisoned by both tribunals and jurists.⁴ Moreover, the distinction between 'occupation' and 'prescription' has itself been obliterated in favour of the flexible but vague concept of 'consolidation'.⁵ Certainly those 'modes' afford no solution to disputes in which two or more parties claim territory relying on different—or even sometimes the same—'mode'. To this problem, the traditional formulations offer no solution—or applicable rules—at all. Furthermore, boundary delimitation and demarcation practices—e.g. methods of drawing base-lines (and their length), equidistance and median lines, watershed and crest-lines—may be pressed by the parties as mandatory rules, but find no support as such in the practice of tribunals or the general practice of States.⁶

(ii) *Tribunals interpret their authority extensively in order to resolve disputes definitively*

Nevertheless, the examples discussed above show that international tribunals adjudicating boundary and territorial disputes consider themselves to be required to resolve disputes definitively. There are few examples—none in this sample—of refusals to adjudicate.⁷ Tribunals,

¹ See, e.g., the *Brazil-British Guiana Boundary*, *Meerauge* (R.D.I. L.C. (1908) 38), *Island of Palmas* and *Rann of Kutch* awards.

² See the *Chamizal* (R.I.A.A., vol. 11, p. 309) and *Meerauge* awards (above, in the preceding note).

³ See *British Guiana Boundary* case (*Great Britain v. Venezuela*), *British and Foreign State Papers*, vol. 92, p. 160: the views of the parties on its application (and the relevant date) conflicted—compare, e.g., *British Counter Case*, *ibid.*, pp. 107 et seq., with *Venezuelan Argument*, pp. 353 et seq.

⁴ See the *Island of Palmas* and *Rann of Kutch* awards; also the *Eastern Greenland* case (P.C.I.J., Series A/B, No. 53, p. 22), the *Minquiers and Ecrehos* case (I.C.J. Reports, 1953, p. 47).

⁵ See de Visscher, *Theory and Reality in International Law*, pp. 200-3; Johnson, [1955] *Cambridge Law Journal*, p. 219; Schwarzenberger, *American Journal of International Law* (1957), p. 303. Compare, however, Waldock, 'Disputed Sovereignty in the Falkland Islands Dependencies', this *Year Book*, 25 (1948), p. 311; Johnson, 'Acquisitive Prescription in International Law', *ibid.*, 27 (1950), p. 332; Lauterpacht, 'Sovereignty over Submarine Areas', *ibid.*, p. 376, at pp. 393 et seq. An alternative approach has been to lay greatest stress on the role of 'acquiescence (and recognition)' often in the form of 'estoppel' or 'preclusion': see in particular the writers cited below, p. 96 n. 2.

⁶ See the *North Atlantic Coast Fisheries*, *Anglo-Norwegian Fisheries*, *Rann of Kutch* and *North Sea Continental Shelf* cases above, pp. 61, 64, 70, 80 nn. 1, 1, 1, 1.

⁷ The *Northeast Boundary* case is the usual example. See also *Peru v. Ecuador*, Carlston, *op. cit.* (above, p. 3 n. 4), p. 207, and Judge Urrutia Holguín, *loc. cit.* (above, p. 46 n. 1).

finding the criteria which they are explicitly directed (e.g. by the *compromis*) to apply so often inconclusive, interpret their authority so as to permit a decision based on other criteria.

(iii) *States acquiesce in these interpretations by tribunals of their own authority*

The examples discussed above are admittedly only a selection from the major disputes of this century. But even of the total number, relatively few have been questioned by the parties as vitiated by *excès de pouvoir*, and all have subsequently been put into effect—albeit sometimes with reservations or modifications.¹ It may be said that the acceptance of an award is governed less by abstract legal considerations (of *excès de pouvoir*, etc.) than by the award's inherent merits—and even an unsatisfactory solution may be better than none.

(iv) *Criteria applied by tribunals to resolve territorial disputes*

International tribunals have in practice developed a number of criteria for attributing sovereignty to one or other party.

(a) *Recognition, acquiescence and preclusion (or estoppel)*

Understandably, the first search of a tribunal faced with a dispute is to find a solution upon which the parties can be said to have agreed. In a sense, this is always an artificial approach: if there were any real agreement, there would be no dispute. Yet it is clear that a solution which purports to give effect to some pre-existing 'agreement' of the parties may be more acceptable, and, indeed, form some protection to an award against allegations of *excès de pouvoir*. Consequently, where genuine bilateral agreement in the form of treaties or the fulfilment of some recognized criterion such as *uti possidetis* is lacking or inconclusive, more artificial concepts of consent in the form of unilateral acts have been developed. Most notably in territorial cases these have been applied by the Permanent Court (in the *Eastern Greenland*² case, for example) and the International Court (where the *locus classicus* is of course the *Temple* case³ and also the *Arbitral Award of the King of Spain*⁴ case).

This approach forms one major trend in the jurisprudence of the International Court. It should, however, be contrasted with the approach of

¹ In this selection, the *Honduras-Nicaragua* and *Chamizal* awards. Other boundary awards are the *Bolivia-Peru* award (1909) (*R.I.A.A.*, vol. 11, p. 133)—subsequently accepted by the parties and modified by treaty—and the *Colombia-Costa Rica* (1900) (La Fontaine, *Pasicrisie internationale*, p. 396) and *Costa Rica-Panama* (1914) (*R.I.A.A.*, vol. 11, p. 519) awards. The latter, which modified the former, was effectively enforced by the United States.

² *P.C.I.J.*, Series A/B, No. 55, p. 22.

³ *I.C.J. Reports*, 1962, p. 6.

⁴ *I.C.J. Reports*, 1960, p. 214.

arbitral tribunals, which have not generally relied on the concepts of recognition, acquiescence and estoppel, but rather base their decisions on the substantial practical links of a disputed territory.¹ This approach too may be seen in the jurisprudence of the International Court (most clearly in the *Anglo-Norwegian Fisheries*, *Minquiers and Ecrehos*, and *North Sea Continental Shelf* cases), but an alternative basis of decision in terms of acquiescence, etc., is usually emphasized. The reasons for this slight difference of approach are not altogether obvious: they may include the reason offered above; the lack of attention accorded the jurisprudence of arbitral tribunals; and the difficulty encountered by a body such as the International Court in reaching agreement on substantive rules of law—and its consequent tendency to stress rules and concepts predominantly of procedure and evidence.

It has been suggested by some writers that acquiescence (especially as creating an estoppel) plays a major role in the acquisition of title to territory.² Thus, according to Schwarzenberger, 'Titles to territory are governed primarily by the rules underlying the principles of sovereignty, recognition, consent and good faith.'³ On closer examination this formula reduces to 'the actual exercise of territorial jurisdiction' (sovereignty) and 'estoppel' (which is the primary effect of the principles of recognition, consent and good faith). In Blum's view the major element in a 'historic title' is 'acquiescence'.⁴ This approach affords, for a number of reasons, an unsatisfactory legal basis for decision.

First, reliance on unilateral acts of recognition or acquiescence as precluding a party from contesting a claim can appear notably unjust. The *Arbitral Award of the King of Spain* and the *Temple* cases are not above criticism. In the former, it might be thought that excessive stress was laid on a failure to protest against an award for five and a half years—a relatively short period—and a considerable delay in instituting proceedings for settling the dispute. The latter decision has been criticized for attaching too great weight to a failure to protest by a weak State against an encroachment by its powerful imperial neighbour. In a condition of organization of international relations in which bilateral negotiations are the typical method of settling disputes, judicial settlement is rarely resorted to, and, in any event, compulsory jurisdiction is still undeveloped, it can appear

¹ See below, under (b).

² See Lauterpacht, 'Sovereignty over Submarine Areas', this *Year Book*, 27 (1950), p. 376, at pp. 393 et seq.; MacGibbon, 'Some Observations on the Part of Protest in International Law', *ibid.*, 30 (1953), p. 293, 'The Scope of Acquiescence in International Law', *ibid.*, 31 (1954), p. 143, and 'Customary International Law and Acquiescence', *ibid.*, 33 (1957), p. 115; Bowett, 'Estoppel before International Tribunals and its Relations to Acquiescence', *ibid.*, p. 176; Blum, *Historic Titles in International Law*; Schwarzenberger, 'Title to Territory: Response to a Challenge', *American Journal of International Law* (1957), p. 308.

³ *Op. cit.* (above, n. 2), p. 324.

⁴ *Ibid.*, pp. 38 et seq.

unreasonable that delay in instituting proceedings for binding settlement of a dispute is taken for acquiescence in a claim. Similarly, it has been cogently observed that to attach too high a probative value to acquiescence is to put a premium on constant and vigorous protest—surely inimical to equable international relations.¹ Furthermore, the concept of estoppel by acquiescence can put a relatively weak State, with no desire to, or good reason to, antagonize a powerful neighbour, at a considerable disadvantage if it finds itself in a position to assert a right later. This point was made very strongly by Judges Spender and Wellington Koo in the *Temple* case.² Clearly apart from the extreme situation of Thailand and France in that case, there are frequently reasons why States may prefer to let an issue—and the territorial cases which have come before international tribunals, particularly the International Court, are frequently of very minor importance—lie dormant for a time.

There are two further difficulties in applying the concept of estoppel to inter-State relations. They are, briefly, that States have a long life span (much longer, on average, than an individual), and are agglomerations of many organs—each of which is made up of many individuals. The application of the concept of estoppel in the broad terms formulated by Judge Alfaro in the *Temple* case therefore meets considerable difficulties of practical application. He put it in the following terms:

... a State party to an international litigation is bound by its previous acts or attitudes when they are in contradiction with its claims in the litigation.³

Now even in the case of individuals, of whom singleness of mind over a period of time may reasonably be expected, the fact that this broad concept of 'good faith' may work injustice is recognized in the restrictions and technicalities by which the broad rule becomes hedged. In particular, as Judge Fitzmaurice described it (in more restrictive terms than Judge Alfaro) in the same case,

... the essential condition of the operation of the rule ... is that the party invoking the rule must have 'relied upon' the statements or conduct of the other party, either to its own detriment or to the other's advantage ... [T]hese statements, or this conduct, must have brought about a change in the *relative* positions of the parties, worsening that of the one, or improving that of the other, or both.⁴

¹ Johnson, *International and Comparative Law Quarterly* (1962), p. 1183, at p. 1203; cf. MacGibbon, this *Year Book*, 30 (1953), p. 293.

² *I.C.J. Reports*, 1962, p. 6, at pp. 85 et seq. (esp. p. 91), and pp. 129 et seq. See also Kelly, 'The *Temple* Case in Historical Perspective', this *Year Book*, 39 (1963), p. 462. A similar point was made by Judge Bebler in the *Rann of Kutch* arbitration, above, p. 77.

³ *I.C.J. Reports*, 1962, p. 40.

⁴ *Ibid.*, p. 63. The rule is framed similarly in the *North Sea Continental Shelf* judgment, § 30. Cf. the limitations of the scope of estoppel in English law, e.g. estoppel by deed: Cross, *Evidence* (3rd ed.), pp. 283-4.

In applying this rule to inter-State relations, it is arguable that even greater restrictions should be placed on it. The long life of States, their multiple and changing representation and the multiplicity of their interests, combine to make 'inconsistency' and 'blowing hot and cold' not a sign of 'bad faith' in any morally blameworthy sense, but simply a normal and natural feature of their acts over any prolonged period of time.

Apart from the temporal difficulty in applying the concept of estoppel, there is the further difficulty that a State does not necessarily speak with one voice at the same time. Illustrations of this in territorial cases are to be found in the *Frontier Land*,¹ *Temple*,² *Argentine-Chile Frontier*³ and *Rann of Kutch*⁴ cases. These cases show that it is quite possible for a State to be, say, practically administering territory at a local level which does not appear on its official maps, or failing to administer territory which does appear on its maps, and that such a situation can persist for a considerable period of time without its arousing attention at the diplomatic level. Similarly, it is apparently possible for more than one State to be administering, to a greater or lesser extent, the same territory. In such cases no simple, tidy estoppels can really be made out. The situation requires a weighing of the activities and positions taken by the claimants.

Perhaps unfortunately, recent decisions of the International Court have seemed to give a greater importance to maps than to administrative activities in attributing sovereignty.⁵ Reasons for this may be that official maps are preferred as acts more closely related to a central governmental authority; whereas administrative activities mostly operate on the local level. Furthermore, maps may afford more notorious evidence of claims to other possible claimants and to third parties. However, equally cogent arguments might be adduced in favour of emphasizing administrative activities. As Judge Lauterpacht remarked in his dissenting declaration in the *Frontier Land* case,

. . . the fact that local conditions have necessitated the normal and unchallenged exercise of Netherlands administrative activity provides an additional reason why, in the absence of clear provisions of a treaty, there is no necessity to disturb the existing state of affairs and to perpetuate a geographical anomaly.⁶

A consequence of these problems of both time and multiplicity of representation of States is that not only can a theoretical 'estoppel' easily be made out against one party, but also frequently against both. This situation arose in the *Temple* case: Thailand failed to protest about the maps, while

¹ *I.C.J. Reports*, 1959, p. 209.

² *Ibid.*, 1962, p. 6.

³ See above, p. 33.

⁴ See above, p. 70 and in particular the comments of Entezam.

⁵ For criticism of this see Weissberg, 'Maps as Evidence in International Boundary Disputes: A Reappraisal', *American Journal of International Law* (1963), p. 781. Cf. the *Argentine-Chile Frontier* case and the *Rann of Kutch* award, above, pp. 33, 70, for recent examples of a less rigid approach to maps as evidence.

⁶ *I.C.J. Reports*, 1959, p. 230.

the French authorities in Cambodia failed to protest the acts of administration undertaken by Thailand in the disputed area. In the *Argentine–Chile Frontier* case both parties tried to establish estoppels—in maps, statements in diplomatic correspondence, and acquiescence in administrative activities. In such cases a court might: attach more weight to one type of activity than another, e.g. maps in the *Temple* case; state that technically the claims of estoppel by both parties have been made out, and both parties are estopped from their respective claims; state that neither party has made out an estoppel against the other and weigh the activities as simply part of the general picture of the evidence. Substantially this latter was the course adopted in the *Argentine–Chile* case; in the *Rann of Kutch* arbitration relatively greater, but not conclusive, weight was attached to maps—so as to create a presumption in favour of the boundary there described, but rebuttable by evidence of a contrary factual situation.¹

(b) *The attribution of territorial sovereignty on the basis of preponderant administrative, social, geographical, historical and cultural links*

Although the application of concepts of acquiescence and estoppel have found most favour with the International Court, arbitral tribunals—and the International Court in the *Eastern Greenland*,² *Anglo-Norwegian Fisheries*³ and *Minquiers and Ecrehos*⁴ cases—have tended to adopt a different approach. The principles applied in the resolution of the majority of the disputes outlined above have been, broadly, the weighing of all the considerations put forward by the parties, and the award of the disputed territory to the claimant to which it is most closely linked.

The considerations put forward by the parties may be roughly divided into the following categories. Evidence of actual *administration* of disputed areas; if the territory is inhabited, the *affiliations of the inhabitants*; *geographical links* including the strategic importance of the area, of the disputed area with the territory of the claimant; similar *economic links*; *historical, social and cultural links*; general considerations of *convenience*. The weighing of these connecting factors is not simply quantitative. The decisions examined reveal certain priorities, and some divergences in the criteria applied to attributing sovereignty over land and sea and inhabited and uninhabited areas appear.

Land areas. Actual administration of territory is here the most important single factor.⁵ This is easily comprehensible: it is both an obvious reflection

¹ There are interesting observations from a geographer's point of view on the value which should be attached to maps, etc., appended to verbal descriptions of boundaries in Jones, *Boundary-Making*, pp. 64–5, 86 et seq.

² *P.C.I.J.*, Series A/B, No. 53, p. 22.

³ *I.C.J. Reports*, 1951, p. 116.

⁴ *Ibid.*, 1953, p. 47.

⁵ See, e.g., the *Minquiers and Ecrehos* case, *I.C.J. Reports*, 1953, p. 47, at p. 57: 'What is of decisive importance, in the opinion of the Court, is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the

of a close interest in territory, and a reflection of the virtual impossibility of ousting a State in clear possession of an area in favour of a claimant. Where the territory is inhabited, the affiliations of the inhabitants will be of great—but, probably, because of the considerations militating in favour of the State in actual possession, secondary—importance.¹ Where the administration is itself disputed and doubtful, the affiliations of the inhabitants will probably be decisive.² In inhabited areas considerations of geography, strategy, etc., will usually be a very secondary consideration.³ Economic, historical, cultural and social factors, and considerations of convenience will usually correspond to the affiliations of the inhabitants. But these considerations, even if they do not all weigh on the same side, will probably only call for some adjustment of a boundary delimited primarily on the basis of the affiliations of the inhabitants.⁴

In uninhabited or sparsely inhabited areas acts of administration are usually scanty and the notion of 'possession' is somewhat fictional. Affiliations of the inhabitants, of course, will be non-existent. Here geographical considerations become of paramount importance. It is in this context that the concepts of 'natural frontiers', 'contiguity', the unity of islands and archipelagos, and the 'sector' theories of division of polar regions appear and are of considerable practical value. In the adjudication of territorial disputes of this type, there is normally no trace of any concept of 'reasonableness' of claims, such as seems to be found with respect to maritime claims, but rather an emphasis on natural geographical units and boundaries.⁵ For the tribunal is normally only given the authority to determine to which of two claimants the territory belongs. And there is no general interest of the international community in land territory such as there is in the high seas and sea bed; the trend of both State practice and international adjudication is to eliminate the status of *territorium nullius* for all practical purposes.⁶ Where even the geography of the area is insufficiently established, lines of compromise and convenience may be drawn.⁷

Sea areas. The important considerations here are not dissimilar to those applied in uninhabited land territory. The major distinction is that, because

Ecrehos and Minquiens groups.' There are similar statements in the *Island of Palmas* and *Walfisch Bay* (R.I.A.A., vol. 11, p. 267) cases.

¹ See, e.g., *Andes Boundary* case, *Argentine–Chile Frontier* case, *Minquiens and Ecrehos* case.

² See, e.g., *Brazil–British Guiana Boundary* case, *Honduras Borders* case and cases cited in the preceding note.

³ See, e.g., *Honduras Borders* case.

⁴ They may be of importance in themselves where the population is nomadic. See *Walfisch Bay* case for grazing grounds of semi-nomadic tribe as of significance.

⁵ See, e.g., *Andes Boundary*, *Meerauge*, and *Guiana Boundary* cases.

⁶ *Clipperton Island* (R.I.A.A., vol. 2, p. 1105) and *Eastern Greenland* case.

⁷ See, e.g., *Barotseland Boundary* case (R.I.A.A., vol. 11, p. 59) and Lindley, op. cit. (above, p. 12 n. 5), pp. 123 et seq. In *sui generis* areas such as the sea bed and its sub-soil (continental shelf, other shallow-water areas and the ocean bed) the concepts both of *territorium nullius* and of a general interest of the international community may still be relevant, however.

(since in this case the outward boundaries of maritime claims separate State territory from a *res communis*) the interests of the general international community must be taken account of, a concept of 'reasonableness' has been applied. Actual administration of sea areas is, of course, somewhat fictional. Actual exploitation of the resources of the disputed area is probably the most decisive consideration.¹ Except, perhaps, in cases of conflict of activities, it is not material whether the exploitation is carried on by State or private agencies.² In either event, the activities of nationals in an area provide occasion for some form of administrative activity by the State. If there is a conflict between State and private activities, then probably State activity establishes a priority of interest—this is particularly so if the private activity by nationals of one claimant is in pursuance of a licence granted by the other claimant.³ The position where there is a prior private activity by nationals of one State and a subsequent State or State-licensed activity by another is more doubtful: probably an international tribunal would be inclined to take advantage of any ambiguities in the situation to safeguard private interests;⁴ otherwise, State interests would probably prevail.⁵ An actual economic interest is probably decisive whatever the precise geographical circumstances. A potential economic interest is probably of considerable weight only where linked to geographical considerations.⁶

Apart from such primarily economic considerations, geographical circumstances are probably the next most important criterion for attributing sovereignty over sea areas.⁷ All the concepts which have been developed in the practice of States—e.g. internal waters, territorial waters, fishing zones, the continental shelf—derive from these considerations of geographical appurtenance and national security, and the interest of States in exploiting the waters off their coasts. These interests are of course balanced by two further factors: the interests of other States in those same sea areas and the capacity of the coastal State to assert and protect its interests—forcibly if necessary.⁸ In international adjudication these factors are reflected in a balancing of the interests of the coastal State with those of the other users of the disputed waters; and this appears in a concept of 'reasonable'

¹ *Grisbadarna, North Atlantic Coast Fisheries, Gulf of Fonseca and Anglo-Norwegian Fisheries cases.*

² *Grisbadarna and Fisheries cases.*

³ *Honduras Borders case*, at p. 1359.

⁴ *Grisbadarna case.*

⁵ *Honduras Borders case*, at p. 1352.

⁶ Cf. the *Honduras Borders case*, above, p. 50 n. 2.

⁷ See the *North Atlantic Coast Fisheries, Gulf of Fonseca and Anglo-Norwegian Fisheries cases.*

⁸ Cf. Judge Read in the *Anglo-Norwegian Fisheries case*: 'The only convincing evidence of State practice is to be found in seizures where the coastal State asserts its sovereignty over the water in question by arresting a foreign ship and by maintaining its position in the course of diplomatic negotiation and international arbitration' (*I.C.J. Reports*, 1951, p. 191). Cf. MacGibbon, this *Year Book*, 30 (1953), p. 293.

claims.¹ It should be noted that, although general concepts of 'equity' and reasonableness may be said to underlie the rules of convention and practice for delimiting maritime boundaries—e.g. the median line, the line of equidistance, the sector principle, distance limits—these are lines akin to those once frequently used for the delimitation of uninhabited and unexplored land areas, of which little or nothing was known in detail. Thus, although they may superficially appear 'equitable' or 'convenient', they may be far from appropriate when their demarcation is attempted.² Practice provides useful tests against which the 'reasonableness' of claims to maritime territory may be tested, but it cannot sensibly be taken to legislate for all special circumstances.

Areas sui generis. The criteria which have been applied in State practice and by tribunals in regard to land and sea areas of differing characteristics provide a store of criteria for the attribution of sovereignty over any area. It is not possible to offer an exhaustive set of priorities applicable to every area, or even to select appropriate analogies. Thus, in the case of the Rann of Kutch it was not unreasonable to suggest that a median line—on the analogy of maritime areas—would offer an appropriate presumptive division. Instead, greater stress was laid on the relevant weight of maps and activities of the claimant States and their predecessors and their citizens in the area. The sort of criteria more usually applied to disputes over land territory were applied to the Rann. On the other hand, to the technically land area of the sea bed State practice seems to be evolving diverse criteria for the continental shelf and the deep ocean bottoms. In State practice prior to the Geneva Convention on the Continental Shelf and in that Convention the analogy of land areas is mainly applied: emphasis is laid on the continental shelf as a continuation of the land domain of a coastal State. Even though in the Continental Shelf Convention a geographical definition is not adopted—partly in order to include areas within the ambit of the Convention which were not, in the strict sense 'continental shelf'—in areas where there is a 'continental shelf' in the geographical sense its edge probably provides an outer limit to claims based on that Convention. The criterion for the attribution of sovereignty is, in effect, geographical continuity.³ With regard to the continental slope and the ocean bottom,

¹ See especially the *Anglo-Norwegian Fisheries* case: note also the concept of 'natural prolongation' in the *North Sea Continental Shelf* judgment.

² For an example of an 'inequitable' result of an equidistance line, see the *North Sea Continental Shelf* cases. See Jones, *op. cit.* (above, p. 21 n. 7) for the practical problems inherent in demarcating boundaries delimited on one general principle (pp. 94-165); for geometrical boundaries in particular see pp. 151-62, and for 'faulty delimitations', see pp. 66-71.

³ Cf. *North Sea Continental Shelf* cases, *loc. cit.* (above, p. 81 n. 1), p. 22: 'the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it . . . '.

however, it may be that criteria analogous to those used in sea areas may be developing: that the concepts of the 'general interest', *res communis* and 'reasonableness' may be of greater significance.

(v) *The status as international law of the criteria adopted by tribunals for the attribution of sovereignty*

The question must now be considered of the status as international law of the criteria described in the preceding section. First of all, it may be useful to compare these criteria with the theoretical formulations of the law of territory which have been offered by writers.

The purely theoretical constructions which do not claim to be founded on the practice of international tribunals are, primarily, the traditional analogy of Roman private law on the modes of acquiring property; and rules drawn from certain fundamental principles of international law: sovereignty, recognition, consent and good faith. It has been mentioned above that these latter rules are expressed in 'the actual exercise of territorial jurisdiction' and 'estoppel'. The inadequacies of these formulations have been pointed out above.¹

Theories which are offered as primarily based on the practice of States or of international tribunals are those associated with the names of Max Huber, Charles de Visscher and Sir John Fischer Williams.

Huber's theory was that—apart from the traditional modes of acquiring territory—'the continuous and peaceful display of territorial sovereignty . . . is as good as a title'. Essential constituents of this concept were: State activity *à titre du souverain*; continuity over some undefined period of time, and, to the extent appropriate to the territory, over the disputed area; some element of acquiescence by other States.² This definition might serve as an adequate justification for undisputed territorial sovereignty, and suffice to determine disputes such as the *Island of Palmas*, where the basis of the claimant title was the exiguous one of mere discovery, but it could not serve to determine disputes in which no, or conflicting, acts of sovereignty were asserted, or the elements of a passage of time, or acquiescence, were not fulfilled.

De Visscher's concept of 'consolidation' reflects the experience of the *Anglo-Norwegian Fisheries* case: it provides a fair description of the criteria applied in that decision, and in other decisions relating to sea areas, such as the *North Atlantic Coast Fisheries* and *Gulf of Fonseca* cases.³ The essentials of this formulation are 'proven long use' allied to 'a complex of interests and relations which in themselves have the effect of attaching a

¹ At p. 96.

² Jennings, *op. cit.* (above, p. 20 n. 2), pp. 20–3.

³ *Theory and Reality in International Law*, pp. 200–3; see also Bastid, 'Les Problèmes territoriaux dans la jurisprudence de la cour internationale de justice', *Recueil des cours*, vol. 107, p. 361.

territory or an expanse of sea to a 'given State' and 'acquiescence' or 'a sufficiently prolonged absence of opposition'.¹ Its major defects are its vagueness—it makes no attempt to analyse the 'complex of interests and relations' involved—and that it merely purports to be yet another 'mode' of acquiring title added to the existing traditional list. Furthermore, it does require some time element ('long use', 'prolonged absence of opposition') to operate, and also some element of acquiescence, whether 'properly so called' or not. Consequently, it provides insufficient guidance for the decisions of concrete disputes.

The theoretical formulation which best approximates to the detailed criteria actually followed by tribunals is that of Fischer Williams. He sets them out in the following form:

If we ask, not what is in fact the basis on which the actual international ownership of territory rests, but what are the considerations by which an international tribunal would usually be guided if called on to decide the fate of a territory, we shall find perhaps the most authoritative statement of these considerations in the recitals to the treaty . . . [of] October 28, 1920, between the Principal Allied Powers . . . and Roumania, for regulating the destinies of Bessarabia . . . [T]he reasons given are (1) the interests of the general peace of Europe, (2) geographical, ethnographical, historical and economic considerations, (3) proof given that the population desired the actual settlement made, and lastly (4) the desire of Roumania to guarantee good government generally, and, in particular, protection of racial, religious and linguistic minorities.²

This formulation provides a modern set of considerations appropriate to territorial changes, and also accords surprisingly accurately—although not founded on them—with the considerations which have been applied by judicial tribunals to resolve questions of disputed sovereignty over land territory.

Apart from the various 'modes' of *acquiring* territory, the *extent* of the territory acquired (by whatever mode) has been little discussed by modern writers. The most useful discussions are to be found in nineteenth century writings,³ but the criteria offered are generally geographical (including

¹ For comment, see Johnson, [1955] *Cambridge Law Journal*, and Jennings, *op. cit.* (above, p. 20 n. 2).

² 'Sovereignty, Seisin and the League', this *Year Book* 7 (1926), p. 24, at p. 34. On the importance of the wishes of the population see pp. 33-4: 'To the wishes (of the population), if an international tribunal has to decide to whom a territory is to be awarded, some weight, at any rate, must be given, not perhaps receiving a decisive weight to the neglect of all other considerations, but *some* weight.' Cf. Kozhevnikov, *op. cit.* (above, p. 5 n. 4), pp. 185 et seq., and the awards, especially of President Wilson and of the U.N. General Assembly, above, p. 7 n. 4.

³ For probably the most useful discussions see Hall, *International Law* (2nd ed.), pp. 101-7, 114-16; Phillimore, *International Law*, vol. 1, pp. 237-65; Twiss, *The Law of Nations*, pp. 190 et seq., and *The Oregon Question Examined*; also Hyde, *International Law*, vol. 1, pp. 439 et seq.; Fiore, *Le Droit international codifié*, Ss. 1044-54, 1070-2; De Martens, *Précis du droit des gens moderne de l'Europe*, vol. 1, pp. 120 et seq. (and Note 21 to 2nd ed.). A useful collection of treaty provisions and views of writers on river boundaries is collected in U.N. Doc. E/ECE/136, Annexes 1 and 2. On the 'median line' as a rule of international law see Bebler's Opinion in the *Rann of Kutch*; and the *North Sea Continental Shelf* cases.

'security'). For example, they suggest that there is a presumption in favour of the unity of moderate sized islands and the assimilation of nearby islands to the mainland; in the case of river boundaries, the *thalweg* and median line are offered as presumptions or rules. The more difficult problem perhaps is that of the boundaries of the area deemed to be 'constructively occupied' by a settlement, for example, on a continent or large island: here watersheds, water-basin, median lines between settlements (and in the case of settlements divided by rivers, *thalweg* and median line boundaries) are suggested. The legal significance to be attributed to influence over the native inhabitants of colonized areas also provides yet more controversial problems. It has further been argued whether the 'mode' by which territory is acquired has any effect on the extent of the territory thereby acquired: e.g. whether 'occupation' affords constructive title to some reasonable extent of territory not in fact settled, while 'prescription' or 'conquest' give title only to the area in fact occupied. But although writers sometimes purport to offer general 'rules' it can only usefully be concluded that each individual situation requires treatment on its own merits.

(a) *Recognition, acquiescence and preclusion*

Now of the criteria applied by tribunals to resolve territorial disputes, the legal status of recognition, acquiescence and preclusion may be regarded as non-controversial. They require elaboration and refinement and their application to particular facts may be difficult and unsatisfactory, but they are admittedly 'legal' concepts. Administrative, social, economic, geographical, strategic, historical and cultural criteria are, although more concrete, controversial. Some writers have described such considerations as for the most part 'political' not 'legal',¹ or at best as a 'penumbra of equities'.² This criticism can take two forms: it may be suggested that certain criteria are inappropriate to be taken into consideration by a judicial tribunal, or simply that a legal title cannot be founded on these criteria alone.

It may be suggested that the first criticism is groundless. It has been pointed out above that no satisfactory line has been drawn between 'legal' and 'political' considerations, and that the development of the international law of territory has been stimulated and shaped by social, economic, geographical, etc., considerations. Furthermore, whatever the legal weight to be attached to these considerations, these are, at the least, part of the

¹ Jennings, *op. cit.* (above, p. 20 n. 2), Chapter 5.

² Brownlie, *op. cit.* (above, p. 8 n. 1), p. 156. See also Jenks, *op. cit.* (above, p. 13 n. 3), p. 357: 'In boundary cases it may sometimes be particularly difficult to distinguish clearly the application of principles of equity, recommendations for action . . . and decisions *ex aequo et bono*.' And (p. 421): 'In territorial matters equity is a composite of history and geography which it is difficult to express as a principle.'

facts of the individual case, and must necessarily be taken into consideration on that account.

The criticism that a legal title to territory cannot be founded on such considerations alone is of greater significance. Thus, all the criteria mentioned are elements of some theory of sovereignty over territory.

(b) *Possession and administration*

Possession or administration of territory is an element of the traditional 'modes' of occupation, prescription and conquest; it is a precondition for the operation of the process of recognition or acquiescence, and is an important element of 'the continuous and peaceful display of territorial sovereignty', and the concept of 'consolidation'. All these formulations require something in addition, however; either the passage of an indeterminate period of time, coupled with acquiescence or simple absence of opposition of the international community in general or of particular interested States, or some positive act of recognition. It may be suggested, however, that emphasis on the passage of time or on acquiescence as legally necessary to the perfection of title by possession is mistaken. These additional elements simply serve to show whether there are in fact any rival claimants seeking to administer the same territory, or whether there is general opposition—for example, to the acquisition of territory by force—implying that the territory is insecurely held. In either of these latter cases, the resolution of the dispute, were it referred to an international tribunal, would have to be based on the variety of other considerations outlined above; where territory has been acquired by force, then international law on the use of force and the validity of title by 'conquest' would require consideration also.

It is conceded in the order of priority of application of criteria suggested above that social, economic and geographical considerations cannot in isolation found a title to territory. Since actual administration takes priority, they cannot normally prevail against clear evidence of possession. It is probably only where such evidence of administration is ambivalent or absent that other criteria have decisive weight.

(c) *Affiliations of the inhabitants of disputed territory*

This is probably one of the more theoretically controversial criteria.¹ It must be remembered, however, that the traditional theories of territorial sovereignty were developed with reference to uninhabited areas, or with respect to relations between colonizing powers *inter se* in areas inhabited by 'natives'.² Today, there are few significant uninhabited areas, and the

¹ But see Fischer Williams and Kozhevnikov, loc. cit. (above, p. 5 n. 4).

² See above, p. 20 and especially Lindley, op. cit. (above, p. 12 n. 5): relations with the native inhabitants were generally secured and formalized by treaties of protection or cession. Some of them are criticized by Westlake, in *Chapters on International Law*, pp. 143 et seq.

principle or right of self-determination and the doubtful status of title by 'conquest' (whether by the lawful or unlawful use of force)¹ have probably led to considerable modification of the traditional law. Furthermore, modern territorial and boundary disputes generally concern not situations of dynamic expansion of frontiers, but relatively static situations where boundaries are settled in principle or within relatively narrow limits. Claims now generally affect relatively small areas of territory and are concerned less with territorial aggrandisement than with the establishment of a convenient and stable boundary.

Furthermore, in most disputes concerning inhabited territory, the affiliations of the inhabitants will be bound up with, and reflected in, the actual administration of the territory.² It must be remembered that most acts of administration commonly relied on to establish sovereignty require the voluntary co-operation of the inhabitants, and, in frontier areas, involve a choice by the inhabitants between the facilities offered by each of the claimant States. This is true, for example, of acts of administration involving voluntary registration: e.g. of births, marriages and deaths, of transactions relating to property and of livestock, etc. The payment of rates and taxes and so forth may also involve some degree of choice between the claims of neighbouring authorities. Such matters are always the stuff of administration, and in isolated or sparsely populated areas may be virtually the only evidence of continuous administration.

(d) *Geographical considerations*

It has been mentioned that these have always, and unsurprisingly, shaped the development of claims to both maritime and sea areas. Not only have they affected the customary law of the sea, but they have also found expression in attempts to codify that law. Thus, in the Geneva Convention on the Territorial Sea and Contiguous Zone, it is provided that the criteria for drawing straight base-lines, i.e. for including sea areas within internal territory, are (1) that they 'must not depart to any appreciable extent from the general direction of the coast', and (2) that 'the sea areas lying within

¹ See Jennings, *op. cit.*, pp. 52 et seq. and the views expressed in the U.N. General Assembly (during the 5th Emergency Special Session) on the status of Israel in the territories occupied after the 1967 June war. For a different view (distinguishing the 'lawful' and the 'unlawful' use of force) see Blum, 'The Missing Reversioner: Reflections on the Status of Judea and Samaria', *Israel Law Review*, 3 (1968), p. 279, and E. Lauterpacht, *Jerusalem and the Holy Places*.

² See, e.g., the *Brazil-British Guiana Boundary*, *Honduras-Nicaragua*, *Island of Palmas*, *Honduras Borders*, *Argentina-Chile* (1902 and 1966) and *Rann of Kutch* awards. Cf. the *Grisbarna* and *Norwegian Fisheries* cases. See also *Costa Rica-Panama* (R.I.A.A., vol. 11, p. 519), *Barotseland Boundary* (*ibid.*, p. 59), *Walfisch Bay* (*ibid.*, p. 263), *Colombia-Venezuela* (*ibid.*, vol. 1, p. 263), *Minquiers and Ecrehos* (I.C.J. Reports, 1953, p. 4), *The Legal Status of Eastern Greenland* (P.C.I.J., Series A/B, No. 53, p. 22). The *Frontier Land* case (I.C.J. Reports, 1959, p. 209) is, of course a marked exception to this approach. See also the views of Sir Thomas Holdich, *Political Frontiers and Boundary Making*, on the *desiderata* of boundary-making; also Jones *op. cit.* (above, p. 21 n. 7).

the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters'.¹ The provisions of this Convention for delimiting boundaries of the territorial sea between opposite and adjacent States admit the exception of 'historic title or other special circumstances'.² The concept of the continental shelf is fundamentally a geographical concept translated—perhaps not very satisfactorily—into legal terms. The essential elements of the legal concept of the continental shelf are the geographical concepts of 'adjacency' and 'continuity' of submarine land areas to the mainland. It is again noteworthy that reference to 'special circumstances' is made in relation to the problem of boundary delimitation.³ Of course, such 'special circumstances' need not be all geographical, but they must surely include geographical considerations.

More contested in theory have been reliances on geographical considerations in claims to land areas. But undoubtedly they have served in practice to delimit the boundaries of claims to uninhabited regions.⁴

(e) *Economic considerations*

These, like the affiliations of inhabitants, are perhaps controversial. In the practice of international adjudication, it has been noted that they are applied mainly in claims to sea areas.⁵ Together with geographical concepts, they have provided the motive force behind claims to exclusive fishing zones and to the continental shelf. Indeed, it may be said that they are the basis of these claims, and that the claims are limited only by geographical considerations. No doubt economic factors should be classed amongst the 'special circumstances' relevant to sea and continental shelf delimitation. They have also generated claims to uninhabited land territory.

(f) *Historical considerations*

These, in alliance with possession, have always been recognized by theorists as of significance. In theoretical formulae they are reflected in the concept of the passage of time as an element in title. In one sense, almost all the evidence relied on to substantiate any title or claim is historical, whether it be length of actual administration, or documentary evidence in the form of treaties, grants and awards, etc., or special rules such as *uti possidetis*. Difficulties arise only when historical considerations such as a prior administration of an area are divorced from actual possession where

¹ Art. 4 (2).

² Art. 12 (1).

³ Art. 6.

⁴ *Brazil-British Guiana Boundary* case; see also the discussion of the 'Hinterland' doctrine—and the conditions for its application, in the *Walfisch Bay* case. See further the writers referred to above, p. 104, n. 3, and the views of Holdich in *Political Frontiers and Boundary-Making*, and of Lord Curzon in *Frontiers*.

⁵ *Grisbadarna, Anglo-Norwegian Fisheries* case; and also, to submarine areas, *North Sea Continental Shelf* cases above, p. 81, for the question of unity of deposits, and to socio-economic questions which might (on the model of the *Fisheries* case) have been taken into consideration.

clearly it is necessary to apply some criterion of 'remoteness', such as is found in the traditional significance of the passage of time as an element in title and concepts of acquiescence and 'a sufficiently prolonged absence of opposition'. Yet these traditional concepts provide no firm guide-line as to the length of time necessary, or even the elements of acquiescence. No strict line is probably even desirable or possible.

(g) *Other considerations*

Within this category might be included such links as cultural unity, and a host of considerations which can only be lumped together under the heading of 'convenience'. Their status as a basis for territorial claims on their own would be very controversial and probably unacceptable. They no doubt do in practice have importance as additional factors supporting the more weighty considerations set out above. They may indeed in exceptional circumstances tilt the scale one way or another, and they may be decisive in modifying in minor ways a boundary determined on the basis of other criteria.

In summary the status of the criteria applied by international tribunals may be stated thus. The criteria of administrative, geographical, social and economic links are regularly applied by 'political' tribunals in the settlement of territorial problems. They are also regularly relied on as cogent evidence in support of their claims by the parties to judicial and arbitral proceedings. They are, indeed, simply the sort of considerations on which any sensible decision to attribute sovereignty should clearly be based. They are applied regularly by international judicial and arbitral tribunals with or without explicit authority in the *compromis*. This weight of practice of both States and international institutions cannot but suggest that, even if they do not commonly find a place in the textbooks, they are generally recognized as appropriate criteria which any decision on territorial sovereignty must regard. Furthermore, these criteria do play a part as elements in most theoretical formulations of the law on the acquisition of territory.

It is probably not appropriate to describe these criteria as rules of customary law, since they are not very easily formulable as rules. The elements to which tribunals must have regard—apart from straightforward documents of title—in territorial cases can be listed. They can be ranged in order of priorities. But since the whole point of this approach is not to apply rules of thumb, but to weigh all the links of the territory with each claimant, and to award sovereignty to the claimant with preponderant links with the whole of the territory—or, if the authority is given, to split the territory—the process cannot be merely quantitative, and the criteria listed can serve only as guide-lines, not rules. The description in the *Anglo-Norwegian Fisheries* case of the role of certain of these considerations in

decisions on the delimitation of the territorial sea may serve to explain the role of all of them:

. . . certain basic considerations inherent in the nature of the territorial sea, bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decision, which can be adapted to the diverse facts in question.¹

It is therefore not as rules but as 'criteria . . . which can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question' that the administrative, social, geographical, economic, etc., considerations can best be seen. It may be noted that the absence of 'precise' criteria or rules is not a feature only of the customary international law of attribution of territory. It is typical of the law on the attribution of other competences: for example, jurisdiction in civil and criminal matters, and the conferment of nationality.

(vi) *The powers of tribunals to make awards on the basis of criteria not explicitly set out in the compromis*

Turning now to the problem of the powers of international tribunals to make awards on the basis of criteria which they were not expressly authorized to apply, and which may—in theory—be of doubtful status as rules of international law, it is useful to recall the conclusions drawn from the practice of international tribunals:

(i) Tribunals consider that they are both authorized and required to render a definitive decision of the dispute referred to them.²

(ii) To this end, they employ criteria which they are not expressly authorized by their constituent instrument to apply.

(iii) The criteria applied are derived by analogy or implication from any special rules laid down in the agreement for arbitration, or from the arguments presented by the parties. Tribunals seem to regard themselves as implicitly restricted to such considerations.

(iv) Similarly, awards rendered by tribunals—even those which consider themselves to have been given a very wide authority—never exceed, and

¹ *I.C.J. Reports*, 1951, p. 116 at p. 133.

² There are numerous arguments against the adjudication of particular categories of dispute and particular cases, and numerous examples of judicial restraint in both international and municipal judicial practice (see p. 18 above and works cited there). But in the practice of international tribunals such examples of restraint seem to be mainly of tribunals with *compulsory* jurisdiction, to the exercise of which one party objects. If both parties want the tribunal to resolve their dispute, then surely the tribunal would be correct in implying the necessary powers to do so. See, e.g., the *Honduras Borders* case (whether the reference to *uti possidetis* signified *de jure* or *de facto* possession) and the *Honduras-Nicaragua* case (whether the powers expressly conferred on a mixed commission by the Gámez-Bonilla treaty were impliedly conferred on a single arbitrator dealing, under the provisions of that treaty, with a disagreement between the members of the mixed commission).

often fall short of, the claims of the parties. That is, the *non ultra petita* principle is applied—with a further tendency towards compromise.

(v) On the whole, States acquiesce in this exercise of authority.

Now this is certainly the pattern found in the decisions examined above. But it is doubtful whether any satisfactory generalization which would amount to a customary rule can be made. If, however, one were to make the attempt, the rule might run thus:

(A) International tribunals have implied authority to give a definitive decision of each dispute referred to them. Moreover, they are required to do so, and are not entitled to refuse to adjudicate, if the parties concur in their doing so.

(B) In that case, they must apply such criteria as are expressed or implied in any special rules laid down in the *compromis*. Failing these—which are, of course, the criteria which *both* parties agree should be employed—they must apply such criteria as have been put forward in the arguments of the parties. The tribunal thus has a discretion to select from the submissions of the parties the criteria to motivate its decision.

(C) A tribunal is not entitled to award more to a party than it has claimed.¹

It will be obvious that in any particular case problems may arise over rule (ii). They may arise in connection with the interpretation of the rules laid down, or the claims of one party may be based on considerations which seem quite extravagant to the other. Yet no precise line of demarcation between 'extravagant' and 'reasonable' considerations can be made, once it is admitted that international tribunals are required to take account of—and do—a host of considerations the legal validity of which can only be determined in relation to the particular case. This does leave a very wide discretion to a tribunal, and suggests that without further circumscription it is unlikely to be accepted in all cases by the parties.

Further circumscription of this wide judicial discretion can be suggested along the following lines. In practice, parties may give their assent to an act of a judicial tribunal either in advance, during the course of the proceedings before it, or afterwards; similarly, of course, they may express their dissent. It might therefore be suggested that a party cannot challenge the *vires* of

¹ This assumes that the claim has been phrased in some definite form. There are perhaps three ways in which a question regarding territory or a boundary might be put to a tribunal: (i) whether sovereignty over a determinate area is vested in one party or another (e.g. *Clipperton Island*, *Island of Palmas*, *Minquiers and Ecrehos*); (ii) where a boundary lies—whether as claimed by one party or the other, with implied authority to determine a median line—as in the *Argentine-Chile* and *Rann of Kutch* cases; (iii) what is the *status* of a territory, or what principles/rules should be applied to the definition of a boundary—e.g. the *Eastern Greenland* and *Status of South-West Africa* cases exemplify the former and the *North Sea Continental Shelf* cases exemplify the latter. In (i) and (ii) the *non ultra petita* rule clearly applies. In (iii), where the tribunal is asked an abstract question of legal principle, *non ultra petita* may have no application. See further below.

a decision on the ground that it was motivated by unauthorized considerations under the following circumstances:

(a) if the considerations applied were expressed or implied in the agreement for arbitration;¹

(b) if they were invoked by that party during the course of the proceedings; or conceded to be within the tribunal's authority;

(c) if the decision was subsequently acquiesced in, i.e. either explicitly accepted or not challenged within a reasonable period of time.

These are obvious practical rules. (a) is theoretically non-controversial, though there can obviously be scope for dispute as to the criteria 'implied' in an agreement. Thus, it may be queried to what extent the process of 'interpreting' a treaty should go, or what precisely is implied in a reference to 'the principles of international law'; but in practice these may often be resolved by reference to (b), which is certainly controversial, because it formed one of the bones of contention in the *Honduras-Nicaragua* case. The arbitrator, the King of Spain, had, in making the award in question, taken account of certain considerations of which he regarded himself as authorized to take account by the *compromis*. During the proceedings, the representatives of Nicaragua—which challenged the validity of the award—had conceded the authority of the arbitrator to apply these considerations. It was subsequently contended that this was not binding on Nicaragua.

The argument under (c) above is supported by the decision of the International Court in the *Arbitral Award* case. The difficulties of application have been pointed out above. In any event, what is 'reasonable' should be interpreted in the light of the factors discussed above.²

(vii) *The limits of the judicial function in territorial and boundary disputes*

It has been pointed out above that the criteria which judicial and arbitral tribunals customarily employ to attribute sovereignty are similar to the criteria which they are sometimes explicitly required to take into account and also to the criteria applied by political bodies for the same purpose. This is hardly accidental: these criteria represent current views on sound boundary-making. They accord with the needs of States for geographical

¹ For problems, see n. 1 on the preceding page. It is a generally accepted rule that an arbitral tribunal is judge of its own competence and has the power to interpret the *compromis* (see, e.g., I.L.C. *Model Rules on Arbitral Procedure*, Art. IX). But this is balanced by the further principle that an award may be challenged on the ground that the tribunal has exceeded its powers (e.g., *ibid.*, Art. XXXV (a)). There is an interesting discussion of this problem and the relevant State practice on the question by Judge Urrutia Holguín in the *Arbitral Award* case—slightly spoiled by referring to the *Honduras Borders* award as an instance of a strict application of the *uti possidetis* rule and therefore a decision strictly in accordance with law.

² At pp. 105 et seq.

unity, economic viability and a cohesive population. Since these criteria are generally applied by judicial arbitral tribunals, however, it may be suggested that it is fallacious to draw a distinction between judicial and political means of dispute settlement (e.g. conciliation, mediation, etc.) on the basis of the criteria applied. The only generally valid and basic distinction is that 'political' means of settlement are rarely binding decisions, while judicial settlement is.

There are, however, differences of technique in the application of these criteria. Since judicial tribunals are of their nature required to apply law, they cannot be so free in their reasoning as political bodies. Thus, if documents of title such as treaties or laws are relied on by the parties to a dispute, or claims based on customary law are made, they cannot be ignored by a judicial tribunal: they must be interpreted. It has been pointed out that the principles of interpretation are so flexible, and customary rules of such doubtful status or value, that they hardly limit the decision which a tribunal may make. But they do restrict its mode of reasoning. Furthermore, there may be some inherent limits to the function of interpreting, say, treaties, which can make its exercise beyond a certain point unconvincing. In addition, a judicial tribunal must operate within limits acceptable to the parties: and these may suggest some caution in the exercise of quasi-legislative powers. Despite these unclear and indefinite limitations, it is suggested that this exploration of the practice of international tribunals shows that tribunals exercise a function distinguishable from both the simple 'application' of law, and from the general making of 'policy' or legislation for the international community as a whole. Their major function in adjudicating territorial and boundary disputes has been to resolve disputes of detail, rather than issues of principle, according to practical criteria appropriate to sound boundary-making. In effect, they exercise a power of delegated legislation for the individual case.

It is perhaps necessary to consider at this point the view that arbitrators dispose of wider powers of adjustment or minor legislation, a greater discretion in taking account of the 'equities' of the particular situation, than do strictly judicial tribunals, that is, permanent courts. There seems to be no real basis for any suggestion that the scope of considerations which judicial, as opposed to arbitral, tribunals may take account of is narrower: a wide range of social, economic and geographical criteria were explicitly taken account of in the *Anglo-Norwegian Fisheries* and *North Sea Continental Shelf* cases, and historical and cultural considerations were not of themselves described as irrelevant in the *Temple* case. In the *Jaworzina*¹ case, the Permanent Court explicitly invoked the notion of the historic boundaries of the States in dispute, and the ethnographical factors

¹ Series B, No. 8.

presuming in their favour. In the *Minquiers and Ecrehos* case, the International Court relied for its decision on the broad range of connections of the disputed island with Jersey, manifested mainly in the activities of individuals—fishermen from Jersey. In the *Gulf of Fonseca* case a wide range of economic, geographical and strategic criteria were explicitly set out by the Central American Court of Justice as appropriate to determining the legal status of waters as ‘bays’.

If international courts do, however, sometimes display a greater caution in their reasoning or in their decisions—and the *Arbitral Award, Frontier Land* and *Temple* cases perhaps offer examples of this—the reason may lie not in any inherent limitations on the judicial as opposed to the arbitral process, but rather in the characteristics of permanent courts. Their very permanence, and the fact that they are of regional or world-wide composition and have some degree of compulsory jurisdiction can encourage caution in the setting of precedents and the development of law, unless there is reasonable certainty that their decisions will command the approval, not only of the parties to the individual dispute, but more generally of the States which accept their jurisdiction. There is also clearly greater difficulty in obtaining agreement on any specific rules of law from a body of considerable size and disparate composition. It may therefore be suggested that there is a range of disputes of significance only to the parties, and perhaps their immediate neighbours, which are most fittingly settled by *ad hoc* arbitration or by appropriate regional tribunals.

A further factor which may be of significance in imposing restrictions on the judicial and arbitral function may be the type of dispute which is referred to adjudication. Thus, Jones¹ distinguishes four stages in the history of a boundary: (1) Political decisions on the allocation of territory, (2) delimitation of the boundary in a treaty, (3) demarcation of the boundary on the ground, and (4) administration of the boundary’. Following McMahon’s terminology,² he distinguishes ‘delimitation’ and ‘demarcation’: ‘Delimitation means the choice of a boundary site and its definition in a treaty or other formal document. It is a more precise step than the general allocation of territory which preceded it, but less precise than the demarcation which usually follows.’³ Of course, these stages may overlap, even so far as to be barely distinguishable where they are performed more or less simultaneously. Thus, say, a broad decision on allocation of territory may be made by treaty, e.g., on ethnographic criteria or on the basis of the

¹ Op. cit. (above, p. 21 n. 7), p. 5. Cf. Lapradelle, op. cit. (above, p. 8 n. 1), who distinguishes the stages of ‘preparation’, ‘decision’, ‘execution’ and ‘voisinage’. See also Prescott, *The Geography of Frontiers and Boundaries*.

² ‘International Boundaries’, *Journal of the Royal Society of Arts*, 84 (1935-I), p. 2.

³ Loc. cit. (above, p. 21 n. 7), at p. 57. He also notes ‘A treaty defines a boundary, the final report of the demarcation commission describes it’.

status quo, and commissioners may be charged with both delimiting and demarcating the boundary on this basis; or allocation and delimitation may be performed by the same body, say, an international conference, and commissioners subsequently charged with demarcation.

Now clearly any one of these stages may be referred to international adjudication, and one might classify the territorial and boundary disputes discussed above according to the stages to which they relate.¹ The *Island of Palmas*, *Clipperton Island* and the *Minquiers and Ecrehos* cases are 'allocation' disputes and awards. The *Eastern Greenland* case was an example of 'allocation' which could, if the Court had found in favour of Norway, have required a decision on 'delimitation' of the boundary between Norwegian and Danish possessions in Greenland. The *North Sea Continental Shelf* cases afford in substance a decision of 'allocation' rather than, as the Court averred, 'delimitation'—it will be recalled that the Court was not there asked to 'delimit' the boundaries in dispute, but to perform the preliminary task of deciding 'What principles and rules of international law are applicable to the delimitation . . .'. The Court put its decision in terms of a finding of a pre-existing customary 'inherent right' to continental shelf areas constituting a 'natural prolongation' of a State's land territory; yet this was by no means previously uncontroversial, and the finding of this principle constituted in effect a decision on 'allocation' (or, as the Federal Republic termed it 'apportionment'), although—perhaps as a matter of judicial technique—this was explicitly denied.

In the *British Guiana Boundary* cases decisions on 'allocation' of substantial portions of territory and on the 'delimitation' of the boundary between the areas awarded to each party were combined—as also in the *Rann of Kutch* award. In the *Jaworzina Boundary* case the Permanent Court in effect gave a decision on the allocation and delimitation of a boundary on the basis of the *status quo ante*. The *North Atlantic Fisheries* and *Gulf of Fonseca* cases (in so far as they related to bays) and the *Anglo-Norwegian Fisheries* case involved decisions on the allocation of sea areas and their delimitation and, in the latter case, the technical problem of base-line demarcation.

In some cases the adjudicating tribunal has been required to demarcate the boundary: thus in the *Andes Boundary* case the tribunal was in effect required to delimit, and, via a demarcation commission, demarcate the boundary. Examples of awards which relate purely to the 'demarcation' stage are the *Monastery of Saint-Naoum*, *Colombia-Venezuela Boundary* and the *Argentine-Chile Frontier* cases.

Now although the factors of which account should be taken in settling disputes at any one of these stages will include some or all of the factors

¹ We are not here concerned with disputes relating to the 'administration' of a boundary.

discussed above, it is evident that discretion of the tribunal will be progressively limited as the boundary is more closely defined. In the allocation of territory the tribunal will be most free to take account of the widest considerations of policy.¹ Once territory has been allocated on the basis of some principle—such as *uti possidetis*—the range of discretion is necessarily narrowed, and will be progressively more attenuated as the boundary is more closely defined by custom, treaty or prior award, until, in disputes at the demarcation stage, the tribunal has scope only to make minor adjustments to fit the boundary as defined to the ground.

¹ As an 'allocation' question in an unusual context the I.C.J. advisory opinion on the *Status of South-West Africa* may be instanced—an opinion in which broad policy considerations may be regarded as having been paramount.

STATUTES AND THE CONFLICT OF LAWS*

By DR. F. A. MANN,¹ F.B.A.

WHILE the conflict of laws has in England grown up as a part of the common law, ever since 1861, when Lord Kingsdown's Wills Act was enacted, the legislator has to an increasing extent intervened by laying down statutory conflict rules. They have given rise to some difficulty, and may merit the comment which an author of distinction felt compelled to make upon statutory conflict rules in the United States: 'The legislatures of America have in general been neither perceptive nor specific in their choice-of-law enactments.'² Academic discussion in this country³ has perhaps not always provided the enlightenment which might have been expected and could have guided the legislator; the present writer at once acknowledges that he may have contributed to the obscurity and is, therefore, in duty bound to assist in eliminating it. On the other hand it would seem that on the whole⁴ English writers have been refreshingly pragmatic and specific and succeeded in avoiding the incredibly abstract and frequently almost unintelligible discussion which dominates the field on the Continent.

In all the circumstances it is proposed to make a fresh start and to approach the problem of statutory conflict rules with an open mind that permits a fundamental and comprehensive investigation. For this purpose it is convenient in the first place to turn to the classification and application of the conflict rules *stricto sensu* (below, section I). There are, however, other, cognate, yet wholly different internal rules the nature and implementation of which will require some very detailed study in the light of comparative material, for English practice does not seem to provide more than limited guidance (below, section II). Next, attention will have to be directed to certain statutes in which the two types of provisions just referred to have become intermixed (below, section III). Finally the

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² Leflar, *American Conflict of Laws* (1968), pp. 225-9.

³ Morris, 'The Choice of Law Clause in Statutes', *Law Quarterly Review*, 62 (1946), p. 170 is the pioneering contribution in the field. See further Unger, *ibid.*, 83 (1967), p. 427; Kelly, *International and Comparative Law Quarterly*, 18 (1969), p. 249; Lipstein, *Recueil des cours*, 135 (1972-I), p. 204; Mann, *Law Quarterly Review*, 80 (1964), p. 29 and *ibid.*, 82 (1966), p. 316, which should be read with Hughes, *ibid.*, 83 (1967), p. 180, and *Recueil des cours*, 111 (1964-I), pp. 54, 69.

⁴ This writer confesses that he has been unable to follow entirely the contributions by Kelly and Lipstein referred to in the preceding note.

discussion will turn to a different aspect of the relationship between statute law and the conflict of laws, viz. the formation of *ordre public* by statutory provisions (below, section IV). A concluding section (V) will summarize the results.

I

Since Martin Wolff's *Private International Law* appeared in England in 1945¹ English lawyers have been conversant with the fact that conflict rules are either 'one-sided' or 'all-sided', and it is as well to start from this widely, perhaps even universally recognized distinction.

1. A conflict rule is 'all-sided' or, in Dr. Morris's much happier phrase,² general if it directs which law is applicable to a given set of facts. Most common law rules relating to the conflict of laws are general in character. Thus the rule is: 'succession to movables is governed by the law of the deceased's domicile'. The rule applies not only to property in England or to the estate of a person who died domiciled in England or was a British subject: it applies also to, say, a Brazilian who leaves property in France.³ And the rule is evidently a conflict rule, because it does not do more than define the legal system applicable to the issue, for this is the only function of a conflict rule and at the same time the function that characterizes it.⁴ Or, to take a hypothetical example (which is being formed for reasons that will become apparent), English law could conceivably include a rule to the effect that 'the discharge of a bill of exchange in a currency other than that of the place of payment shall be governed by the law of the place of payment'. It would be a general conflict rule as defined.

Such general conflict rules do not often occur in English statutes, but there are some examples. Thus the Wills Act 1963 provides in general terms that the formal validity of a will is determined by the law of the place where it is executed or by the law of the country where at the time of execution or his death the deceased had his domicile or habitual residence or was a national. Similarly s. 1 (3) of the Marriage (Enabling) Act 1960, lends itself to the reformulation of the general conflict rule according to which the validity of a marriage between a man and his former wife's sister, aunt or niece or between a woman and her former husband's brother, uncle or nephew is determined by the law of the country or countries in which at the time of the marriage the spouses are domiciled.

Sometimes a general conflict rule may properly be deduced from the combined effect of two statutory provisions. Thus if one joins ss. 1 (1) and 8 (1) of the Legitimacy Act 1926, one obtains the rule that the question

¹ Section 89.

² In the article referred to above (p. 117 n. 3), or in his *Conflict of Laws* (1971), p. 235.

³ *Renvoi* is for present purposes ignored.

⁴ Cf. Cheshire and North, *Private International Law* (8th ed., 1970), p. 9.

whether the marriage between the parents of an illegitimate child renders such child legitimate from 1 January 1927 or the date of the marriage is determined by the law of the country in which the father was or is at the time of the marriage domiciled.

The characteristic feature of all these provisions is that they refer the problem to a specific legal system (frequently called the *lex causae*) and do so with generality, i.e. without limitation to British subjects or to similar groups of persons or to defined sets of facts. Nor, of course, do they lay down any substantive legal rule—they merely express a choice of law.

2. Conflict rules are 'one-sided' or unilateral or particular¹ if they define the circumstances in which English law is applicable. An example would be a rule which could, but does not in fact exist and according to which 'the discharge of a bill of exchange expressed in a currency other than sterling but payable in England shall be governed by English law'.

It is difficult to find an actual provision of this type in the body of English statute law other than s. 2 (2) of the Legitimacy Act 1959, which may be put as follows: 'The legitimacy of the child of a marriage which is void but believed by the spouses or either of them to be valid (putative marriage) is determined by English law, namely by s. 2 (1) of the same Act, if the father of the child was domiciled in England at the time of birth or, if he died before the birth, at the time of his death.' Dicey and Morris² suggest that s. 2 (2) 'is not so much a general rule of the conflict of laws as a provision delimiting the territorial scope of the rule of English domestic law'. It is not certain whether much more than a question of terminology is involved, but s. 2 (2) does indicate in what circumstances English law applies and, therefore, is a 'one-sided' rule of the conflict of laws.

On the Continent there has for many years been an extensive debate whether a unilateral conflict rule is to be preferred to or is perhaps even more legitimate than a general one. When towards the end of the nineteenth century the German Civil Code was drafted and discussed, the Government procured the prevalence of unilateral rather than general conflict rules on the ground that they were less expressive of 'a cosmopolitan standpoint'.³ Whatever one may have thought or may now think about such reasoning, it very quickly proved wrong in that, by a process of extensive interpretation or analogy, the German courts turned the particular conflict rule into a general one. At the same time there were academic defenders of the unilateral system.⁴ It is probably no exaggeration to say that they had

¹ This is the phrase preferred by Dr. Morris, above (p. 117 n. 3), though it is not quite certain whether he would not confine it to the cases discussed in section III, below.

² *Conflict of Laws* (9th ed., 1973), p. 438.

³ Nussbaum, *Deutsches internationales Privatrecht* (1932), pp. 27, 28 and many other German works.

⁴ Originally the principal protagonist was Schnell, *Zeitschrift für internationales Privat- und Strafrecht*, 5 (1895), p. 337, who at the turn of the century had a few followers.

become a historical peculiarity, when in recent years unilateralism had an unexpected revival in Germany¹ as well as elsewhere.² It involved much abstract dogmatism of a wholly unproductive character. It remained without influence upon judicial or legislative practice. English lawyers are unlikely to benefit from any attempt to acquaint them with these discussions.

It is much more important to raise the question of principle whether an English judge is permitted to derive a general from a particular conflict rule. As has been pointed out, German and, indeed, Continental courts have followed such a process of analogy for many decades and treated the particular conflict as the expression of a principle justifying the formulation of a general conflict rule. Thus, would it be possible in England to suggest the following rule based on the Legitimacy Act 1959: 'The legitimacy of the child of a putative marriage is determined by the law of the country in which the father of the child was domiciled at the time of birth or, if he died before the birth, at the time of his death'? It is submitted that, as a matter of principle, the answer must be in the negative. This is due to the curious relationship which in England prevails between common law and statute law. The latter does not usually or, perhaps, ever displace and abolish the common law so as to make a fresh start. The continental codes proceeded in this manner, but in England the common law always remains in reserve so as to apply to cases which are not caught by the statute. The common law is the rule, legislation is the exception which covers no more than the field clearly cut out for it. It follows that, where the common law has developed a rule of the conflict of laws this is not normally overridden by a statute which applies to a different case, but which, by a process of extensive interpretation, could be applied to cases not covered by its terms. These continue to be subject to the common law rule. It is only where the common law has failed to produce an established rule and where it is therefore necessary to find one that it is permissible to have regard to the statute and to treat the solution furnished by it as one of the elements upon which the common law rule may be built. Suppose, for instance, English law had not succeeded in establishing a settled rule as to the law governing the status of legitimacy (and it is in no sense intended to take a position on a very controversial point),³ then and only then the Legitimacy Act 1959 could be invoked for the purpose of giving some, though by no means conclusive, support to one of the theories that have been put forward. This is precisely what Cheshire and North attempt to do.⁴ The point under

¹ Wiethölter, *Einseitige Kollisionsnormen als Grundlage des internationalen Privatrechts* (1956).

² For a comparative survey with references to Italian discussions see De Nova, *Recueil des cours*, 118 (1966-II), p. 573, or Gothot, *Revue critique de droit international privé* (1971), pp. 1, 209, 415.

³ See, generally, Dicey and Morris, *Conflict of Laws* (9th ed., 1973), pp. 431 et seq.

⁴ *Private International Law* (8th ed., 1970), p. 434, Dicey and Morris (cited in the preceding note), pp. 438-9, discuss the problem, but do not take a firm position.

discussion is illustrated by a decision of Cumming-Bruce J. It was argued before him that capacity to marry was governed, not by the law of the matrimonial domicile, but the laws of the parties' domiciles. The latter test was said to have been adopted by Parliament in certain statutes of 1960 and 1972. The learned judge rejected the argument on the ground that he was 'concerned with the common law rights of the lady who in 1951 was Miss Mary Magson. Those rights are not to be cut down by any misapprehension about the common law entertained by the Law Commission, by the government or by Parliament.'¹ On the other hand, a case in which a statute was used for the interpretation and development of a common law rule is *Travers v. Holley*:² the jurisdiction of a foreign court in matters of divorce was held to be co-extensive with that conferred by the legislator upon an English court in like matters. The underlying assumption was that the common law had not yet exhaustively defined the cases in which the divorce jurisdiction of foreign courts was recognized. That assumption proved to be correct.³

II

From conflict rules, whether they be general or particular, there are to be distinguished those internal rules which embody words of limitation or qualification. Thus the applicability of a statute may be confined to citizens of the United Kingdom and Colonies or to foreigners⁴ or to a ship registered in the United Kingdom or to events such as deaths occurring in this country.⁵ Or s. 72 (4) of the Bills of Exchange Act 1882, deals with the case of a bill drawn out of the United Kingdom which is stated to be for a sum of foreign currency payable in the United Kingdom, and provides that 'the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable'. A much discussed example is the Carriage of Goods Act 1924 (or 1971), which applies the Hague Rules to outward shipments from the United Kingdom.

¹ *Radwan v. Radwan* (No. 2), [1972] 3 All E.R. 1026, 1038, 1039.

² [1953] P. 246. Cf. *Nagle v. Feilden*, [1966] 1 Q.B. 633, at 651, where Danckwerts L.J. said that the Sex Disqualification (Removal) Act 1919, 'whether it applies to the present case or not, shows the position of present-day thought'.

³ *Indyka v. Indyka*, [1969] 1 A.C. 33.

⁴ This is rare in modern legislation. See, however, s. 502 of the Merchant Shipping Act 1894, which applies to a British ship or the Copyright Act 1956, which in s. 1 (5) defines a 'qualified person' primarily as a British subject. In Germany there existed at one time numerous provisions which discriminated against foreigners. They formed a whole branch of the law called *Fremdenrecht*. It was (and is) the general opinion that this is a branch of German substantive law: see Staudinger-Korkisch, *Introduction*, nn. 74, 77.

⁵ A good foreign example is provided by the Joint Resolution of Congress of 1933 which invalidated gold clauses attached to 'dollar' obligations. It would be impossible to read into this a prohibition of all gold clauses: see Mann, *The Legal Aspect of Money* (3rd ed., 1971), p. 187 and *Recueil des cours*, 132 (1972-I), p. 129.

Laws of this type have been, perhaps fortunately, so much neglected in England that no universally accepted description is available for them. Writing in the United States in 1943, Nussbaum¹ called them spatially conditioned internal rules,² a term that is both clumsy and inaccurate, because the qualifying ingredient of the rule frequently has a character other than a spatial or territorial one. This defect also attaches to the phrase 'localized laws', which Professor Cavers proposes,³ but it is a shorter term and is, therefore, not unattractive. The best description, however, comes from the pen of Professor de Nova who for some years has given much attention to what he aptly calls 'self-limiting' legislation.⁴ It is proposed to adopt the term for present purposes, though Professor Cavers's phraseology will from time to time be followed.

1. The first and most important point that has to be made about self-limiting laws is that they are not conflict laws. A conflict rule answers the question which law should be applied to a given set of facts. Self-limiting rules define the conditions which determine the happening of a substantive legal result. The contrast between conflict rule and internal rule is in no sense blurred by the fact that the internal rule includes elements or words of limitation which could be and sometimes are part of a conflict rule in that they indicate what is called the point of contact. The distinction is one of principle and is clearly apparent from the wording of the statute. But it is not merely one of formulation. It indicates different functions and different results.

There may be cases, it is true, in which the wording does not make it clear whether the legislator has provided for the application of a particular system of law or laid down the circumstances in which a substantive rule of internal English law is applicable. No English example involving this type of obscurity could be found. Some learned writers⁵ have mentioned Art. 992 of the Dutch Civil Code. It provides that a Dutchman cannot outside Holland make a will otherwise than by a notarial act. It should not be open to doubt, however, that this is a rule of internal Dutch law. It does not touch the question whether Dutch law or non-Dutch law is applicable.

Nor is the sharpness of the distinction jeopardized by the fact that the conflict rule and the localized internal rule have a common feature, viz. the

¹ *Principles of Private International Law*, p. 71. Lipstein, *Recueil des cours*, 135 (1972-I), p. 204, recently adopted the expression.

² Nussbaum's German work, *op. cit.* (above, p. 119 n. 3), p. 4, referred to 'Sachnormen mit inländischen (ausländischen) Tatbestandsmerkmalen'.

³ *The Choice-of-Law Process* (1965), pp. 225-6.

⁴ De Nova, *Diritto internazionale* (1959), p. 13, or in French *Mélanges Maury* (1960), vol. 1, p. 377. The article which mentions earlier Italian work is still fundamental. See the same author in *Recueil des cours*, 118 (1966-II), pp. 531 et seq., and *Revue hellénique de droit international* (1969), p. 24.

⁵ Lipstein, *Recueil des cours*, 135 (1972-I), p. 206, among others.

delimitation of the realm of application or the scope of substantive law. In a very general and vague sense this is evidently so. But the similarity of legislative objects must not be allowed to obscure the fact that the legislator has chosen a specific method which has to be respected.

Accordingly one must guard against the tendency, frequently noticeable on the Continent, to describe self-limiting internal laws as 'disguised conflict rules'.¹ In England it is even more necessary to avoid the pitfall which Dr. Morris may have created by referring to a class of statutes 'with a particular *choice of law clause* purporting to delimit the scope of a rule of *domestic law*'.² Thus, he expressly lumps together the particular conflict rule³ and the self-limiting internal rule and believes⁴ that *both* are included in Nussbaum's 'spatially conditioned *internal rules*'. It is therefore almost inevitable that he puts s. 1 of the Carriage of Goods by Sea Act on the same level as the wholly different conflict rules contained in the Inheritance (Family Provisions) Act 1938, and the Law Reform (Frustrated Contracts) Act 1948, discussed below.⁵

2. With great respect to the learned author and those who follow him,⁶ such confusion must be avoided for highly practical reasons.

If we are confronted by a conflict rule, it has to be applied. It is mandatory.

Localized or self-limiting rules of internal law, however, are, at least in principle, applicable only if it has previously been ascertained that, by virtue of the conflict rule, English substantive law applies. In such a case it is wrong to say that the court 'simply applies its own statute'⁷ or that 'where an English statute by its express terms applies to a contract an English court must apply it irrespective of the proper law'.⁸ Or according to Rule 147 of Dicey and Morris⁹ 'the validity or invalidity of a contract

¹ In *Germany* this expression is used by Neuhaus, *Grundbegriffe des internationalen Privatrechts* (1962), pp. 49–50 and Makarov, *Grundriss des internationalen Privatrechts* (1970), p. 16. Similarly already Melchior, *Die Grundlagen des deutschen internationalen Privatrechts* (1932), pp. 58–60, who spoke of 'conditionally applicable conflict rules'. The distinction is, however, clearly seen and emphasized by Nussbaum, *op. cit.* (above, p. 119 n. 3), p. 4; Raape, *Internationales Privatrecht* (5th ed., 1961), p. 4 and Kegel, *Internationales Privatrecht* (3rd ed., 1971), pp. 23–6. Some *French* writers also employ misleading terminology. Francescakis' reference to 'règles matérielles de droit international privé' was adopted by von Overbeck, *De Conflictu Legum* (Essays presented to Kollwijn and Offerhaus, 1962), p. 362; Rigaux, *Droit international privé* (1968), No. 75, and van Hecke, *Recueil des cours*, 126 (1969–I), p. 454. Yet both Professors Rigaux and van Hecke accept that as a matter of the conflict of laws domestic law must be applicable before a 'règle matérielle de droit international privé' may be taken into account.

² *Law Quarterly Review*, 62 (1946), p. 170 or, more recently, *Conflict of Laws* (1971), p. 235.

³ In the sense mentioned above, p. 119.

⁴ *Loc. cit.* (above, n. 1 on this page), n. 1.

⁵ *Ibid.*, pp. 176 et seq. and *op. cit.* (above, n. 2 on this page).

⁶ In particular Unger, *Law Quarterly Review*, 83 (1967), p. 427.

⁷ See Morris, *Law Quarterly Review*, 62 (1946), p. 176.

⁸ See Morris, *Conflict of Laws* (1971), p. 235, where he seems to treat the whole of s. 72 of the Bills of Exchange Act 1882 as a choice-of-law clause.

⁹ *Conflict of Laws* (9th ed., 1973), p. 748. There is not a single case or any legal principle that can be quoted in defence of the words in Rule 147 which are mentioned in the text. The Comment

must be determined in accordance with English law, independently of the law of any foreign country whatever, if and insofar as the application of foreign law would be opposed . . . to the provisions of an Act of Parliament which, by the terms of the Act or by virtue of established principles of statutory interpretation, applies to the contract'. On the contrary the principle is that English law, including statute law, even though of a mandatory character, is only applicable if, in accordance with the rules of the conflict of laws, the *lex causae* is English. This is not always expressly emphasized, but is in fact implicit in the doctrine of the proper law as universally practised. Dicey and Morris admit this for the converse case in which the proper law is English and, consequently, English statute law does, but foreign statute law does not apply.¹ The results must surely correspond where the proper law is foreign: English statute law does not, in principle, apply.

It may well be that in certain cases the localized rule may be of so fundamental a character as to be *d'ordre public*—a point that will require some discussion.² It is also possible that the localized internal rule may assist the judge in the development of a conflict rule where none exists. But these are exceptional circumstances. The fundamental difference remains and demands the solution of the conflict problem before the statute falls to be considered.

It is suggested, therefore, that s. 72 (4) is applicable only where the bill is subject to English law in accordance with s. 72 (2) of the Bills of Exchange Act.³ It is further submitted, for example, that the liability of a 'seaman employed in a ship registered in the United Kingdom' under ss. 39 to 41

to the Rule, particularly pp. 754–6, mentions some special or exceptional cases which in this article are dealt with under their appropriate headings, but nothing is said to maintain the generality of the principle. In particular on p. 754 there is a reference to four enactments, viz. the Carriage of Goods by Sea Act 1924, the Law Reform (Frustrated Contracts) Act 1943, the Contracts of Employment Act 1972 and the Redundancy Payments Act 1965. On these statutes see below, pp. 125, 132–3, 137. These are three types of enactments. Having put them on the same level, the learned Editors continue: 'Whenever an Act of Parliament by its express terms thus applies to the validity or invalidity of a contract, an English court must obey the enactment, without considering the effect of any foreign law which might otherwise be applicable to the case.' The sentence is qualified by and, therefore, perhaps tenable in consequence of the use of the word 'thus' which refers to the three different, but special, cases. If in spite of the word 'thus' the sentence is intended to express a general rule, it would be necessary respectfully to disagree. Rule 147 is in line with and, in its present formulation probably stems from, Professor Kahn-Freund's earlier suggestions: *Transactions of the Grotius Society*, 39 (1954), p. 60; *The Growth of Internationalism in English Private International Law* (1960), pp. 46–8.

¹ *Conflict of Laws* (9th ed., 1973), p. 755, where reference is made to several types of legislation (wagering, rate of interest, moratoria) included in a foreign legal system, but immaterial where the proper law is English. The most authoritative case (which is not mentioned) is *Metliss v. National Bank of Greece*, [1958] A.C. 509.

² Below, p. 137.

³ Thus Dicey and Morris, *Conflict of Laws* (9th ed., 1973), p. 861, say correctly that s. 72 (4) is 'a rule of the domestic law of the United Kingdom'. And see Mann, *The Legal Aspect of Money* (3rd ed., 1971), p. 321 as compared with p. 328.

of the Merchant Shipping Act 1970, for damages arising from absence without leave, smuggling or fines imposed under immigration laws presupposes the existence of a contract governed by English law—admittedly a hypothesis which will exist almost invariably. Or when the Sale of Goods Act 1893, as amended by the Supply of Goods (Implied Terms) Act 1973, exempts a 'contract for the international sale of goods' from certain of its mandatory provisions and defines the term in s. 62 (1), the applicability of English law is presupposed. In strictness the question whether a contract is one for the international sale of goods cannot, therefore, arise before the proper law of the contract has been found to be English.

Moreover, the Carriage of Goods Act 1924, or the Carriage of Goods Act 1971 (which at the moment of writing is not in force), cannot be invoked except where the bill of lading is governed by English law. Suppose a ship flying the Norwegian flag sails from an English port to a destination in Norway. The Norwegian owner issues a bill of lading expressed to be subject to Norwegian law, and in the circumstances no argument based on 'evasion' could possibly be raised. It is submitted that the English Act does not apply (and if the Norwegian counterpart is similarly framed it would also be inapplicable because there is no outward shipment from Norway). This is disputed¹ and has not at any time come up for decision in England,² but is in line with sound principle. The critics ought to attack the terms of the Hague Rules or of the statute incorporating them rather than the effects of a valid choice of law, for it is its very essence that the chosen legal system applies and that another country's law, whether it be mandatory, imperative, directory or optional, whether it be common law or statute law, is irrelevant³—subject always to the exceptions to be discussed below. The result would be different if the Carriage of Goods by Sea Act contained, not a self-limiting provision, but a choice-of-law clause to the effect that all matters covered by the Hague Rules shall be subject to the law of the place of shipment. Neither the Act of 1924 nor the Act of 1971 contains such a term, though in regard to the latter enactment the editors of Dicey and Morris suggest the contrary.⁴ The argument is that the new Article X of

¹ In the sense of the text Carver's *Carriage by Sea Act* (12th ed. by Colinviaux, 1971), Nos. 310–11. For a different view see Dicey and Morris, *op. cit.* (in the preceding note), p. 754; Cheshire and Morris, *Law Quarterly Review*, 56 (1940), p. 320, at p. 329; Morris, *ibid.*, 62 (1946), p. 176; Scrutton, *Charterparties* (17th ed., 1965), pp. 395, 402.

² *Vita Food Products v. Unus Shipping Co.*, [1939] A.C. 277, is not in point. The issue was whether the failure to obey s. 3 of the Newfoundland Carriage of Goods by Sea Act, i.e. the 'clause paramount', rendered the contract illegal in a Nova Scotia court. The answer was in the negative for three distinct reasons, viz. first, English law applied (pp. 289–92); secondly, even if Newfoundland law had been relevant, it did not create an illegality (p. 292); thirdly, even if there had been illegality in Newfoundland, it did not create an exception from the operation of the proper law (p. 295). It should, however, be noted that there is a dictum by MacKinnon L.J. in *Ocean Steamship Co. v. Queensland State Wheat Board*, [1941] 1 K.B. 402, at 412, which plainly supports the submissions in the text.

³ See also below, p. 134.

⁴ *Conflict of Laws* (9th ed., 1973), p. 822.

the Rules is 'an attempt to close the gap' and 'an express enactment in force in the forum . . . which makes the Rules apply irrespective of the intention of the parties'.¹ If and in so far as this is a matter of public policy the point will be discussed later.² If and in so far as it rests on the alleged existence of a choice-of-law clause it is not sustainable. The statute merely provides for application of the Rules if (a) the bill of lading is issued or (b) the carriage is from a port in a contracting State or (c) the bill of lading provides that the Rules or the legislation of any State giving effect to them are to govern the contract. It is submitted that all this is subject to the applicability of English law. Article X is a self-limiting internal provision. It does not express a choice of law.

Authoritative support comes from a very useful statement of the law recently made by Lord Wilberforce. In *Hardwick Game Farm v. S.A.P.P.A.*³ claims for damages were based, *inter alia*, on s. 2 (2) of the Fertilisers and Feeding Stuffs Act 1926 according to which on the sale for use as food for cattle or poultry of certain articles 'there shall be implied, notwithstanding any contract or notice to the contrary, a warranty by the seller that the article is suitable to be used as such'. One of the questions for decision was whether the section applied to sales under a c.i.f. contract. The answer was in the affirmative, for s. 2 (2) 'applies to all contracts governed by, i.e. the proper law of which is, English law'. That the section would not apply where the proper law is foreign is, it is true, a matter of inference. But the inference, it is submitted, is compelling. In fact it constitutes the *ratio decidendi* of an even more recent decision of the Court of Appeal. In the important case of *Sayers v. International Drilling Co.*,⁴ Salmon and Stamp, L.JJ. held the plaintiff's contract of employment to be governed by Dutch law. It was for this reason that they felt entitled and compelled to disregard section 1 (3) of the Law Reform (Personal Injuries) Act 1948, according to which 'any provision contained in a contract of service . . . shall be void insofar as it would have the effect of excluding or limiting any liability of the employer in respect of personal injuries caused to the person employed . . . by the negligence of persons in common employment with him'.⁵

Support may also be derived from the interesting practice of the supreme tribunals of Germany. Section 662 of the Commercial Code which deals with some of the matter included in the English Carriage of Goods by Sea Act, and a decree of 5 December 1939 defining its territorial ambit have been held by the Federal Supreme Court⁶ to apply only 'if according to the

¹ *Conflict of Laws* (9th ed., 1973), 822-3.

² Below, p. 140.

³ [1969] 2 A.C. 31, at 139. In the same sense Lord Pearce at 121-2.

⁴ [1971] 1 W.L.R. 1178.

⁵ See on this case below, p. 141.

⁶ BGHZ 25, 251 (255, 265), and see Schaps-Abraham, *Das deutsche Seerecht* (3rd ed., 1962), s. 662, n. 8. In France the legal position does not seem to be entirely clear. Art. 3 of the law of

rules of private international law German law would be applicable'. Sections 89b and 92c of the Commercial Code confer upon a commercial agent with a place of business in Germany the indefeasible right to compensation in the event of the contract's being terminated; they were held to be inapplicable where the contract of agency was subject to Dutch law.¹ Finally a German statute protecting employees against unfair dismissals could not be invoked by an American who under a New York contract worked in Germany for an American employer.²

3. As has appeared from the examples previously referred to, the self-limiting element often included in domestic legislation is usually explicit. But it may be implied, though it is not necessarily always to be implied where an express provision is missing.

The most significant implication arises from the well-established rule of construction according to which 'Parliament does not design its statutes to operate beyond the territorial limits of the United Kingdom'.³ The rule has been formulated in many different ways, but its essence is clear: British legislation is territorial in character, though it may extend to British subjects wherever they may be. This principle which is equally firmly established in the United States,⁴ for which there exists high authority in France, Belgium and Germany⁵ and which, indeed, may be said to be inherent in the nature of things, presupposes the application of English law. Two questions must be clearly distinguished: does English law apply? If so, does the internal English statutory provision extend to the circumstances in issue?⁶

Thus, on the one hand, an English statute may require world-wide application. This is so where it affects the status of persons domiciled in England. According to s. 2 of the Marriage Act 1949, 'a marriage solemnized between persons either of whom is under the age of sixteen shall be void'. In *Pugh v. Pugh*⁷ it was held that this provision⁸ related to the status

24 July 1966 provides that 'en matière internationale le contrat d'affrètement est régi par la loi du pavillon, sauf convention contraire des parties'. Art. 16 of the same *loi* provides that 'le présent titre est applicable aux transports effectués au départ ou à destination d'un port français'. Is it not possible that Art. 16 is a localized domestic law which applies only in the event of the bill of lading's being subject to French law in accordance with Art. 3? Yet Batiffol, *Traité de droit international privé* (6th ed., 1974), No. 251 n. 7 *bis* gives the impression that Art. 16 is a *loi de police* which a French court will always have to apply.

¹ Federal Supreme Court, 30 January 1961, NJW 1961, 1061 or IPRspr. 1960 and 1961, p. 132.

² Federal Labour Court, 20 July 1967, IPRspr. 1966 and 1967, pp. 166 et seq. See the decision of the Dutch Hoge Raad, 13 May 1966, *Revue critique de droit international privé* (1967), p. 522.

³ *Tomalin v. Pearson & Co.*, [1909] 2 K.B. 61, 64 per Cozens-Hardy M.R.

⁴ For a collection of cases in which it has been laid down, see *Recueil des cours*, 111 (1964-1), p. 66 or *Studies in International Law*, p. 54.

⁵ *Ibid.*, pp. 63 and 52 respectively.

⁶ It is regrettable that the clear distinction is frequently being blurred, particularly in the United States. Anton, *Private International Law* (1967), pp. 73 et seq., seems to treat the second question as a conflict question.

⁷ [1951] P. 482.

⁸ Or rather its predecessor, s. 1 of the Age of Marriage Act 1929.

or capacity of persons rather than to the form of a marriage ceremony and that, therefore, it applied only and always in the event of one (or both) of the parties' being domiciled in England. A similar and very instructive example is supplied by the opinion delivered by Lord Wilberforce in *Hardwick Game Farm v. S.A.P.P.A.*¹ Having held that the Fertilisers and Feeding Stuffs Act 1926 applied as a result of the contract's being subject to English law, he proceeded as follows:

One must next consider . . . whether there should be some additional requirement such as that the place of performance should be in this country.

He reached the conclusion that 'the Act should apply to sales c.i.f. (U.K.) where the goods are in fact delivered ex-ship to a purchaser'. As a matter of English substantive law a self-limiting provision was read into the statute.

It is interesting to note that the like approach was recently adopted by the German Federal Supreme Court. Section 313 of the German Civil Code provides that a contract for the sale of land requires notarial form. For many years there was a strong current of opinion in Germany to the effect that s. 313 did not apply in the case of the sale of foreign land. The Federal Supreme Court, however, held that in the event of the contract's being subject to German law s. 313 applied irrespective of the *situs* of the land, for the purpose was to safeguard against ill-considered sales of land and the legislator's protective policy required implementation wherever the contract was governed by German law.²

On the other hand the cases which arose under the Variation of Trusts Act 1958, cannot, it is submitted, be readily reconciled with principle. In *Re Paget's Settlement*³ the facts were held or assumed to be as follows: A settlor domiciled in England settled American funds upon American trustees who administered the trust in New York. They were to hold the trust property for a tenant for life who was domiciled in England and whose issue were the capital beneficiaries. The settlement was probably governed by the law of New York. Following an earlier decision rendered by Ungood-Thomas, J.,⁴ Cross J. (as he then was) held that the jurisdiction under the Act was 'unlimited' and that he could and should exercise it.⁵ This, with great respect, cannot be right for—as has been said on an earlier occasion⁶—by the Act of 1958 the court cannot have 'been given power, subject to any procedural question of jurisdiction, to vary any will, settlement or other

¹ Above, p. 126 n. 3.

² BGHZ 52, 239 (4 July 1969); 53, 189 (6 February 1970).

³ [1965] W.L.R. 1046.

⁴ *Re Ker's Settlement Trusts*, [1963] Ch. 553.

⁵ In fact the learned judge was no doubt greatly influenced by extraneous circumstances which, as so often, are likely to provide the real *ratio decidendi*: the application was unopposed, a New York court had no power to vary the settlement and a New York court, curiously enough, had held (though Cross J. plainly did not accept) that the settlement was governed by English law.

⁶ *Law Quarterly Review*, 80 (1964), p. 29.

disposition made anywhere under any law by testators or settlors of any domicile or nationality, and irrespective of the situation of the property or the whereabouts of the trustees'. Suppose these had been the facts before Cross J. and there had been no features of any kind connecting the settlement with England. Surely the jurisdiction would not have been exercised nor would it have existed, for the English legislator, as the reader has been reminded, 'cannot pass a law to bind the rights of the whole world'.¹ What, then, is the limiting ingredient? There can be only three grounds of legislative jurisdiction, viz. the presence of the trustees in England and, therefore, the personal control over them, or the existence of property in England and, accordingly, the legislator's territorial power, or the submission of the settlement to English law. In the circumstances the most appropriate and sensible connection with England is provided by the fact that the transaction is governed by English law. It is an unalterable fact, while the identity of the trustees as well as the situation of trust property are much more likely to be fortuitous or variable.² It is the fact of the proper law's being English that renders an otherwise foreign settlement subject to English fiscal jurisdiction.³ It is the same fact that renders a settlement subject to the English court's jurisdiction to vary.

4. There remains the problem of self-limiting internal laws which form part of a foreign legal system (as opposed to English law with which the preceding observations were concerned). At this point one notices the remarkable fact that several authors of distinction believe themselves to be faced with a problem of 'considerable difficulty'⁴ or a problem which is described as 'fort délicat'.⁵ Yet it is respectfully suggested that the practical application of the law is reasonably straightforward and that difficulties do not arise.

The starting-point is plain. The conflict rule of the *lex fori*, so we assume, has rendered foreign internal law applicable. This is to be applied in exactly the same manner and sense as it provides. Just as, in regard to the element of time, the transitional laws of the *lex causae* are to be applied,⁶ so in regard to space the foreign legal system's self-limiting provisions of a territorial character must be given effect.

Thus let it be supposed that the German branch of an English company enters into a contract with a German who is appointed sole sales agent for Italy and accordingly has his place of business there. The contract is subject to German law. It excludes the agent's right to compensation upon termination of the contract. The agent sues in England for payment of the

¹ *Buchanan v. Rucker* (1808), 9 East 192.

² It is satisfactory to note that Morris, *Conflict of Laws* (1971), p. 410, seems to agree.

³ *Duke of Marlborough v. Attorney-General*, [1945] Ch. 78.

⁴ Lipstein, *Recueil des cours*, 135 (1972-I), p. 205.

⁵ De Nova, *Mélanges Maury* (1960), vol. 1, p. 393.

⁶ See this *Year Book*, 31 (1954), p. 217, at p. 232.

compensation. An English court would apply German law. It would find that this negatives the plaintiff's claim, because his place of business is in Italy and the exclusion of compensation is therefore valid.¹ Or take an actual case decided by the Privy Council.² A borough council in New Zealand obtains a loan from an insurance company in Victoria (Australia). It is subject to the law of Australia. A statute passed in Victoria reduces rates of interest. The borrower relies on it and pays at the reduced rate. The Victorian statute has to be so construed as to exempt from its scope mortgages on land outside Victoria. The New Zealand courts and, on appeal, the Privy Council accept the territorial limitation inherent in the Victoria legislation and affirm the right to the full rate of interest. A final example is supplied by *Sayers v. International Drilling Co.*³ The plaintiff's contract of employment with the defendants (which was held to be governed by Dutch law) included a clause limiting the defendants' liability for certain damages. Under Dutch law such a clause was invalid in the case of a domestic contract, but valid in the case of an international contract. Accepting the Dutch definition of the scope of the Dutch law in issue, the Court of Appeal held the contract to be international in character, so that the clause was valid.

Against such results which appear almost obvious two objections have been raised.

(a) For reasons which it is not easy to follow it has been suggested that the type of case now under discussion has something to do with *renvoi*. Professor Balladore Pallieri seems to have been the first to make this point.⁴ The reasoning appears to have started from the function of the conflict rule, which is to define the scope of the application of substantive law. Since the self-limiting internal law performs the same function, it is to be treated as if it were a conflict rule. If one gives effect to the delimiting constituent contained in the foreign internal law, and therefore does not apply foreign law in its purely internal form, one recognizes a kind of *renvoi* and this would, at least in Italy or in the realm of contracts, be contrary to established principle.

Every step in this reasoning is so clearly untenable that it will be sufficient to quote from the convincing and courteous reply which Professor De Nova has made:⁵

The anti-renvoists may find, on closer inspection, that they do not really have any reason to worry about those foreign substantive rules which but for their own limitations would govern a given case. Applying a foreign 'self-limiting' substantive rule on

¹ See above, p. 127.

² *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society*, [1938] A.C. 224. The text simplifies the facts and the reasoning. In fact Lord Wright's opinion gives rise to some difficulties.

³ Above, p. 126 n. 4.

⁴ See the references by De Nova, above, p. 129 n. 5.

⁵ *Recueil des cours*, 118 (1966-II), p. 533. In the same sense Toubiana, *Le Domaine de la loi du contrat en droit international privé* (1972), No. 237.

its own terms—namely, only when the case at hand perfectly fits its scheme—is not paying obeisance to foreign rules of private international law, which is the essence of *renvoi*. It is simply applying that substantive of the competent legal order which does fit the facts of the given case—as those facts are seen by that legal order.

(b) The second criticism is perhaps a little weightier. Francescakis¹ has formulated it with regard to legislation containing words of limitation: 'Faut-il la respecter comme telle ou se dire qu'en tout état de cause le domaine d'application d'une loi étrangère est fixé par la règle de conflit qui a donné compétence à cette loi?' As Kelly has helpfully recalled,² the problem arose many years ago in Australian judicial practice. Before the decision of the Privy Council which was mentioned earlier,³ the High Court of Australia had to decide at least two cases which involved similar facts. In the course of separate opinions he delivered, Evatt J. made the point that the question whether the Victorian legislation expressly or impliedly included words of self-limitation was irrelevant, for the parties' choice of Australian law involved a reference to such Australian law as applied in Australia in regard to legal relationships of a purely Australian character. Thus the choice of Australian law has the purpose⁴

... to treat the rights and obligations of the contracting parties upon the same footing as if all of the material and relevant parts of the transaction were taking place, and to take place, within the State of Victoria.

The choice, so it was said, was 'meaningless, unless it implies that the general law of Victoria is to be applied to the transaction, without paying regard to the limited territorial application which is a characteristic and inevitable feature of all Victorian laws'.⁵ Again: 'Victorian law must mean, if it means anything, a system of law which applies in Victoria to local transactions of the same general character as those represented by the present debentures.'⁶

This view is based upon the interpretation of the parties' intentions as expressed by the choice-of-law clause. It is possible that in some cases it will lead to the same results as the approach advocated in these pages. Thus it is difficult to believe that anyone could hold that in the hypothetical case referred to above a commercial agent who has no place of business in Germany should have a claim to compensation which German law does not grant. Or is it intended to create the fiction that the commercial agent should be treated as if he had a place of business in Germany? This is hardly credible. The answer of principle is thus indicated. The reference

¹ *Revue critique de droit international privé* (1966), p. 1, at p. 11.

² *Loc. cit.* (above, p. 117 n. 3).

³ Above, p. 130 n. 2.

⁴ *Barcelo v. Electrolytic Zinc Company of Australasia* (1937), 48 C.L.R. 391, at 433, 434.

⁵ *Ibid.*, 435.

⁶ *Ibid.* For similar remarks see *Wanganui Rangitiki Electric Power Board v. Australian Mutual Provident Fund* (1934), 50 C.L.R. 581, 605.

to foreign law, it is submitted, means a reference to the law as it applies to the given case and as it is meant to be applied to it. To apply the foreign law so that it applies in cases other than the given one, or, conversely, to refashion or distort the foreign law so that in the view of the judge it is better suited to the given case, these are propositions which are unacceptable and even unarguable.

III

It has been shown that there exist on the one hand (general or particular) conflict rules which have no purpose other than to effect a choice of law (above, section I) and, on the other hand, statutes laying down substantive rules of internal law, which include words of self-limitation, yet presuppose a conflict rule rendering English law applicable (above, section II). With these two fundamentally different cases there is to be contrasted a third group of cases which are of a 'hybrid'¹ character in that they constitute substantive or internal law, yet include words of limitation peculiar to and, indeed, expressive of a conflict rule.

The Inheritance (Family Provisions) Act 1938, in certain cases confers power upon the court to order reasonable provision for the benefit of the surviving spouse and children 'where a person dies domiciled in England'.² Here, therefore, the legislator ordains that, subject to the order of the court, an individual is entitled to substantive rights and another individual is under a corresponding duty. We are confronted by a rule of internal law. At the same time the substantive rule is limited in its application. But the words of limitation are those known to the conflict rule: the deceased's domicile must have been in England. From this point of view part, but only part of the statute could be expressed as a conflict rule: 'The question whether and in what circumstances provision out of the net estate may be made for the surviving spouse and children of a person who died domiciled in England is governed by English law.' This would be a 'one-sided', unilateral or particular conflict rule, because it merely deals with the circumstances in which English law applies. It would supplement the substantive rule which the same sentence of the statute enacts. A similar case³ is s. 1 (1) of the Law Reform (Frustrated Contracts) Act 1943, which renders the Act applicable 'where a contract governed by English law has become impossible of performance or been otherwise frustrated', and provides for restitution. This again is primarily a rule of substantive law, but, by way of limitation, there is added a particular conflict rule, for the judge is told when English law

¹ Morris, *Law Quarterly Review*, 62 (1946), p. 172, speaks of 'a bastard hybrid'. The former word is hardly apposite.

² Section 1.

³ The similarity refers to the legislative technique rather than the subject matter of the legislation.

governs the problem of restitution: 'restitution of payments made in pursuance of a frustrated contract is governed by English law if the contract was subject to English law'. Perhaps one could suggest even a general conflict rule: 'The question whether and in what circumstances provision out of the net estate may be made for the surviving spouse and children is governed by the deceased's domicile.' Or, 'in the event of the frustration of a contract restitution is determined by the law governing the contract'.

In so far as such internal laws express a substantive rule they do not require any comment. In so far as they include a conflict rule most lawyers are likely to describe it as so obvious that they will readily accept it either in the particular or in the general form. Indeed Dr. Morris regards the reference to the deceased's domicile in s. 1 of the Inheritance (Family Provisions) Act 1938 as 'unnecessary because the courts would have reached the result which the draftsman evidently desired without any help from the statute'.¹ Yet this is not certain. The statute, it is submitted, enables the court to make provision 'out of the net estate' and this would seem to include immovables wherever situate.² Since normally immovables are in every respect subject to the *lex situs*, the statute, therefore, includes an innovation. It thus gives rise to a question which is by no means easy: does the particular conflict rule in s. 1 of the Act permit the English judge to create a general conflict rule with the result that in the case of a deceased who died domiciled abroad the law of his domicile decides upon the provision to be made for his spouse and children out of his net estate including immovables wherever situate? Such a claim, obviously, could not be prosecuted under the Act of 1938, but there is no reason why in the exercise of its inherent jurisdiction the court should not be able to make such an order, provided, of course, that the deceased's personal representative can be found in England. For the reasons which have been given it would, however, probably not be in line with the English lawyer's attitude towards statute law to derive a novel common law rule from an analogy to a statute.

On the other hand, if the same kind of inquiry is made in regard to the Law Reform (Frustrated Contracts) Act 1943, the result ought to be different. Does it permit a general rule to the effect that in the event of the frustration of a contract restitution depends upon the law of the contract? The common law would have no difficulty in developing this rule on the strength of its own teachings. There is much to be said against the view that the law to be applied should be the law of the place where the benefit is conferred or the enrichment takes place.³ In weighing the arguments the court could and should take account of the legal policy expressed by the

¹ *Law Quarterly Review*, 62 (1946), p. 178.

² Morris, loc. cit. (in the preceding note) seems to agree.

³ In this sense, in particular, Gutteridge and Lipstein, [1939] *Cambridge Law Journal*, p. 80.

Act of 1943. In the words of Lord Wright,¹ used in a different context and described by Lord Simonds as 'felicitous',² the statute may well be regarded as an 'authoritative declaration' of the common law. Where this can be said, where, in other words, the statute does not constitute a new departure but confirms and applies the prevailing trend of the common law, it provides strong support for, though by no means conclusive evidence of, a general conflict rule. Hence the suggestion that the particular conflict rule formulated by the Act of 1943 is 'unnecessary and inadequate'³ is not persuasive. To put it at its lowest, the statutory rule is useful.

However this may be, the technique of hybrid statutes, that is to say, of statutory provisions which lay down a rule of internal law limited by such points of contact as are familiar to the conflict of laws, may be unnecessary, but it is unobjectionable in theory and may on occasions be useful in practice. Even if, as Dr Morris seems to suggest, the mixing of substantive and conflict rules tends to 'obscure the fundamental distinction' between them, no prejudice is likely to occur.

IV

There remains the problem of the relationship between statutes and *ordre public*.

It is not foreign legislation that gives rise to the issue. Where English conflict rules render a foreign legal system applicable, the statutes forming part of the latter (if and in so far as they wish to be applied) will be given effect by an English court. At the same time statutes forming part of a foreign legal system other than the *lex causae* are, in principle, disregarded. Thus if the contract is made in Newfoundland where it is illegal, but is governed by English law under which it is legal, a Nova Scotia court will give effect to it.⁴ Or the legislation of a legal system other than the *lex causae* may create an impossibility⁵ or its deliberate violation by means of deception may offend English public policy.⁶ These and similar cases are outside the purview of the following discussion.

On the other hand, as regards the effect of English legislation upon English *ordre public*, the starting-point undoubtedly is that, even in an English court, English legislation is, in principle, material only if, from the point of view of the conflict of laws, English law applies and, accordingly, must be disregarded if the English conflict rule refers to a foreign *lex causae*. The mere fact that English law is embodied in a statute does not give it

¹ *Syndic in Bankruptcy of Khoury v. Khayat*, [1943] A.C. 507, at 514.

² *In re United Railways of Havana*, [1961] A.C. 1007, p. 1045.

³ Morris, *Law Quarterly Review*, 62 (1946), p. 183.

⁴ *Vita Food Products v. Unus Shipping Co.*, [1939] A.C. 277.

⁵ *Ralli Brothers v. Compania Naviera Sotay Aznar*, [1920] 2 K.B. 287.

⁶ *Regazzoni v. K. C. Sethia (1944) Ltd.*, [1958] A.C. 301.

such force as to confer the character of *ordre public* upon it. In the light of the latter conception statute law has no higher quality than a common law rule. In particular, the mere fact that the English statutory provision is mandatory in character does not mean that it must be observed and applied where foreign law governs. This is well established by authority,¹ but may be more broadly based, for logic and justice require statutory provisions to be put on the same level as common law rules, and it is well established that the proper law of the contract determines validity where, for instance, consideration is missing² or fraudulent misrepresentation is alleged;³ even if illegality under English law would invalidate an English contract, it will not necessarily do so in the case of a foreign contract.⁴

It is in no sense inconsistent with these submissions that an English statute which prohibits a transaction so as to render its conclusion illegal demands application in an English court irrespective of the identity of the *lex causae*.⁵ The decision of the House of Lords in *Boissevain v. Weil*⁶ affords compelling proof in favour of a rule which is not only accepted abroad,⁷ but also makes good sense and loses nothing from the fact that in other respects, not relevant for present purposes, that decision gives rise to grave doubts.⁸ No court can be expected to lend its aid to the enforcement of a contract which its law forbids. Where the contract as such is prohibited by the *lex fori*, judges do not stop to inquire whether the contract is governed by domestic or foreign law.⁹ Although legal writers of authority have expressed a different view,¹⁰ they ought not to be followed, for they give insufficient weight to the fact that the English prohibition was

¹ See, e.g., the cases on wagering contracts such as *Saxby v. Fulton*, [1909] 2 K.B. 208, and Dicey and Morris, *Conflict of Laws* (9th ed., 1973), pp. 757-9.

² *Re Bonacina* (1912), 2 Ch. 394.

³ *British Controlled Oilfields v. Stagg* (1921), 127 L.T. 209.

⁴ Cf. Cheshire and North, *Private International Law* (8th ed., 1970), pp. 225, 230, where the learned authors say that there is no conflict with English public policy 'merely because it is inconsistent with some statutory rule, however imperative the language of the enactment may be. The statutory rule . . . is no more imperative than a rule at common law.' With great respect, this statement is entirely correct, but it is directed against the decision in *Boissevain v. Weil* (below, n. 6 on this page), and for the reasons to be developed presently is, therefore, in appropriate *in casu*.

⁵ Where an English statute renders the performance of a foreign contract illegal, different considerations apply: the problem is one of impossibility of performance rather than illegality of the contract. See on the problem Dicey and Morris, *Conflict of Laws* (9th ed., 1973), p. 782 and the discussion in this *Year Book*, 18 (1937), pp. 97, 107 et seq.

⁶ [1950] A.C. 327.

⁷ German Supreme Court, 7 July 1926, IPRspr. 1926 and 1927, No. 13.

⁸ It was submitted earlier that the proper law of the contract was not English (*International Law Quarterly*, 3 (1950), p. 60, at p. 70) and that the British legislation did not intend to and could not lawfully reach the transaction in question (*Recueil des cours*, 111 (1964-I), p. 124 or *Studies in International Law*, p. 108).

⁹ This was already put forward in *Recueil des cours*, 132 (1971-I), p. 109, at pp. 127-8.

¹⁰ Kahn-Freund, *Transactions of the Grotius Society*, 39 (1954), pp. 62-4, whom Cheshire and North follow in *Private International Law* (8th ed., 1970), p. 225, but who states the law correctly in Dicey and Morris, *Conflict of Laws* (9th ed., 1973), p. 756.

understood by the House of Lords to extend to the conclusion of the transaction as such, i.e. it comprised all contracts of the type in issue.¹

The connection between statute law and *ordre public* makes its appearance in three respects.

1. Statutory provisions may demand application where the proper law of a contract is expressly stated to be foreign, but ought to be English. Thus s. 55A of the Sale of Goods Act 1893, as amended,² reads as follows:

Where the proper law of a contract for the sale of goods would, apart from a term that it should be the law of some other country or a term to the like effect, be the law of any part of the United Kingdom, or where any such contract contains a term which purports to substitute, or has the effect of substituting, provisions of the law of some other country for all or any of the provisions of sections 12 to 15 and 55 of this Act, these sections shall, notwithstanding that term, but subject to section 61 (6) of this Act, apply to that contract.

By this new text, sections 12 to 15 and 55 (which deal with liability for defects of title or quality of goods and contractual exemption therefrom) have to a limited extent been given the character of *ordre public*. They do not apply where even in the absence of express terms the contract is unquestionably governed by a foreign legal system or where the contract is governed by English law but is one for the international sale of goods.³ The effect, therefore, is different from that in the usual case of a statutory provision which is *d'ordre public*: it requires application in every case, whatever the proper law may be. It is only where the contract would, in the absence of express terms referring to a foreign legal system, be governed by the law of any part of the United Kingdom that sections 12 to 15 and 55 necessarily form part of it.

The effect and interpretation of this provision are by no means free from difficulty. Its analysis has been attempted elsewhere⁴ and is not to be repeated in the present context. It must suffice to draw attention to a new method of extending the international scope of a statute.

2. An even more significant legislative intervention has been brought about by certain statutes relating to employment. In at least three cases,

¹ The view put forward in the text may derive support from two important decisions coming from Scotland and Australia respectively. *English v. Donnelly* (1958), S.C. 494 was concerned with a hire purchase contract between an English company and a Scottish hirer. It was governed by English law, but was made in Scotland where it contravened Scottish hire-purchase legislation. It was held that this caught all contracts made in Scotland. *Kay's Leasing Corporation v. Fletcher* 116 (1966-1967), C.L.R. 124 was concerned with a hire-purchase agreement made in and governed by the law of Victoria. The sellers brought an action in the courts of New South Wales against the buyers who were residents of the latter State and who invoked its hire-purchase legislation which invalidated the contract and rendered its conclusion a criminal offence. The defence failed. The case was decided according to the law of Victoria, because the New South Wales legislation was construed as applying only to contracts made in New South Wales.

² By the Supply of Goods (Implied Terms) Act 1973.

³ Within the meaning of the new s. 62 (1) of the Sale of Goods Act 1893.

⁴ *Law Quarterly Review*, 90 (1974), p. 42.

viz. in the case of the Contracts of Employment Act 1972,¹ the Redundancy Payments Act 1965² and the Industrial Relations Act 1971,³ the legislator introduced a provision to the effect that 'for the purposes of this Act it is immaterial whether the law which (apart from this Act) governs any person's employment is the law of the United Kingdom or of a part of the United Kingdom or not'.

If, then, the identity of the proper law is immaterial does this mean that all employment contracts are necessarily subject to the law of the United Kingdom? The answer is clearly in the negative. The employment contract remains subject to its proper law for all purposes other than those covered by the statutes. Even in so far as the statutes apply by virtue of the *ordre public* proclaimed by them, they do not extend to all employment contracts, for the statutes contain self-limiting provisions.

Thus, according to s. 12 (1) of the Contract of Employment Act 1972, the application of certain earlier sections is excluded 'in relation to employment during any period when the employee is engaged in work wholly or mainly outside Great Britain, unless the employee ordinarily works in Great Britain and the work outside Great Britain is for the same employer'. The other two statutes include similar provisions.⁴ Their effect is within the field covered by the legislation to render the law of the principal place of work applicable and thus to supersede, in particular, the proper law of the contract. This result could have been brought about by a choice-of-law rule. The legislator has adopted the more circuitous road of ensuring the applicability of English statute law in any event and, then, of defining its scope.

3. Finally, it is necessary to turn to the question whether and in what circumstances statutory policy can be the source of public policy in the legal sense,⁵ i.e. of *ordre public*. The answer should be that there is no reason at all why a statute should not be capable of yielding a rule *d'ordre public*, but that the instances in which this is likely to happen are rare and have become rarer as a result of the fact that the legislator seems to have acquired the tendency to indicate himself when he wishes his statute to constitute the *ordre public* of the country.⁶

A different view has for twenty years been advocated by Professor Kahn-Freund. He has blamed the English courts for 'being prepared to see a policy of international application in the rules they have made themselves', while 'they do not accord the same privilege to rules contained in statutes'.

¹ S. 12 (2), re-enacting s. 9 (1) of the Contracts of Employment Act 1963.

² S. 56 (4).

³ S. 167 (10).

⁴ S. 17 of the Redundancy Payments Act 1965, on which see Mann, *Law Quarterly Review*, 82 (1966), p. 316, and Hughes, *ibid.*, 83 (1967), p. 180; s. 27 (2) of the Industrial Relations Act 1971.

⁵ As defined by Parke B. in *Egerton v. Brownlow* (1853), 4 H.L.C. 1, at p. 123.

⁶ See above, p. 136.

It is said to be wrong 'that the value from the point of view of public policy which the courts attach to a rule depends on its source, that is, on whether it is judge-made or Parliament-made'.¹ Or, as it has been put in successive editions of Dicey and Morris:²

It has never been held that an Act of Parliament is capable of yielding a principle of public policy which an English court would have to apply to a contract not governed by English law, unless the case was within the express terms of the statute. . . . Why should a principle of morality have the power to invalidate a foreign contract if it happens to be formulated by judges, but not if it was formulated by Parliament?

These submissions were criticized and rejected on an earlier occasion,³ but since they have been maintained without change, it is unfortunately necessary once again to attempt their refutation.

In the first place there is no evidence that English judges apply different standards to such fundamental rules as may be laid down by Parliament. In order to prove his thesis Professor Kahn-Freund gives three examples, none of which is convincing. One of the 'remarkable results' which the alleged judicial tendency is said to have produced is that 'a contract for the sale of slaves governed by the law of Brazil was held to be enforceable in England, the prohibition against slave trading being embodied in a statute'.⁴ This is *Santos v. Illidge*.⁵ If one looks at the case one finds that, while Britain had long before 1860 abolished the holding of, and the trading in, slaves, there remained on the statute book section 5 of the Slave Trade Act 1843, permitting a sale of slaves in cases in which the holding of slaves was not unlawful. In Brazil the holding of slaves was not unlawful. Consequently the Act of 1843 required the court to hold that the sale in issue was permissible. No question of public policy could arise, because the statute applied and could not be disregarded. It is then said that 'it is this different treatment of judicial and parliamentary legislation which serves as a justification for the refusal to give international force to Acts of Parliament dealing with gaming contracts and with moneylending'.⁶ As regards the former, reference is made to *Saxby v. Fulton*.⁷ It was there held that a loan made abroad under foreign law for the purpose of facilitating gambling had to be repaid and that the lender's claim could not be defeated on the ground of public policy, because it was not contrary 'to the basis of morality which irrespective of the statute law is assumed to prevail in this country'.⁸ In

¹ *Transactions of the Grotius Society*, 39 (1954), pp. 65-6.

² *Conflict of Laws* (9th ed., 1973), p. 753.

³ *Recueil des cours*, 132 (1971-I), pp. 129-33.

⁴ See above, n. 2 on this page. See also Morris, *Conflict of laws* (1971), p. 236, who also speaks of 'remarkable results'.

⁵ (1860), 8 C.B. (N.S.) 861.

⁶ See above, n. 2 on this page.

⁷ [1909] 2 K.B. 208.

⁸ At 227 per Vaughan Williams L.J. who distinguishes the case of an express statutory prohibition of the conclusion of the contract. This is in accordance with the submissions above, p. 135.

view of the oddities of English gaming legislation it was surely impossible to suggest that the statute which by its terms did not catch the transaction¹ expressed so fundamental a policy as to demand a dismissal of the claim. As to moneylending, reference is made to *Shrichand v. Lacon*.² An Englishman obtains a loan in India from an Indian moneylender. The loan is repayable in India and is governed by Indian law. If it had been made in England the Moneylenders Acts would apply and invalidate it. In India it is valid. Is it really sound policy to impose English conceptions of morality and legal policy upon the transaction in question? The answer is clearly in the negative. In England professional moneylenders, except bankers, pawnbrokers and certain others, must be licensed; the unlicensed moneylender's contract is illegal and void; contracts must be contained in a note or memorandum and, if harsh and unconscionable, may be set aside or revised by the court; contracts providing for interest at a rate higher than 48 per cent. per annum are presumed to be harsh and unconscionable. Assume that no such legislation exists in India. Should an English court treat a contract made by an Indian moneylender as illegal merely because he is, and is bound to be, unlicensed? Should an English court revise the terms of an Indian contract, merely because it would revise an English contract? Should an Indian contract providing for interest at 50 per cent. per annum be presumed harsh and subject to revision? It is plainly impossible to transpose English legislation enacted to regulate life in England in a manner consonant with English institutions and conceptions to wholly different conditions in India.³ On the other hand it is a broad principle of English law that unfair and improvident transactions with the poor and ignorant are liable to be set aside.⁴ This is a flexible principle expressing an elementary policy of universal application. It does represent a rule of public policy, while the specific legislation about moneylenders lacks a comparable thrust.

The second argument against the thesis propounded by Dicey and Morris has been put as follows: Public policy in England is not political policy⁵ such as is very frequently expressed in parliamentary legislation, and even 'statutes designed to implement a social policy' are not necessarily an emanation of public policy.⁶ This is offended 'only in clear cases in

¹ It is noteworthy that not only statutes relating to wagering contracts, but also other statutes referred to by Dicey and Morris, p. 755, 'have been held to apply only to contracts the proper law of which is English', although the statutes were in each case mandatory. This is in line with the point made in this paper, but cannot easily be reconciled with Rule 147 in Dicey and Morris.

² (1906), 22 T.L.R. 245.

³ It does not appear that in the case under discussion any argument based on public policy was addressed to the court. For the reasons given in the text it ought not to have succeeded. But the decision cannot be criticized for failing to notice an argument which was not put.

⁴ Snell, *Equity* (27th ed., by Megarry and Baker, 1973), p. 551.

⁵ See above, p. 137 n. 5.

⁶ See, however, Dicey and Morris, *Conflict of Laws* (9th ed., 1973), p. 756.

which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few' judicial or parliamentary minds.¹ What one has to look for is a violation of fundamental standards of morality, justice or welfare. It is possible that the standard will be supplied by a statute. But it is unlikely that so fundamental a standard will be established by the statute in opposition to or independently of the common law. It is submitted, therefore, that there is neither justification nor need for any extension of the principle of public policy such as English law has developed it.

It remains to be added that there is a considerable body of evidence which in fact is inconsistent with the suggestions made by Dicey and Morris. It is undeniably a basic rule of English statute law that a marriage cannot be celebrated otherwise than in the personal presence of the spouses.² Yet England does not regard proxy marriages concluded abroad as contrary to public policy.³ German⁴ and Belgian⁵ courts have decided in the same sense and elsewhere the dominant view is to the same effect.⁶ It is a rule of English statute law that uncle and niece cannot intermarry.⁷ Yet such a marriage celebrated abroad is not 'offensive to the conscience of the English court' and therefore not contrary to public policy.⁸ Would it not be consistent to criticize and reject these decisions⁹ for their failure to give effect to the public policy enshrined in the English statutes?

We do not know the answer, but we do know that Professor Kahn-Freund favours the recognition of another head of statutory public policy, viz. the enforcement of a uniform standard of substantive law formulated in an international convention to which the United Kingdom is a party.¹⁰ Here the argument is directed against certain of English cases which upheld contracts involving the avoidance of the Hague Rules.¹¹ Where this has happened, it is said that 'the logic of the conflict of laws is at variance with the need for the unification of commercial law. Should not a contract designed¹² to frustrate such unification be regarded as contrary to English

¹ *Fender v. Mildmay*, [1938] A.C. 1, at p. 12 per Lord Atkin who, however, referred only to judicial minds.

² This is nowhere expressly stated, but everywhere assumed. See Lord Merriman in *Apt v. Apt*, [1947] P. 127, at 139, in the court of first instance. Incidentally, the learned President had 'no doubt that the Marriage Acts, in common with public Acts of Parliament in general, declare the public policy of this country regarding their subject-matter.'

³ *Apt v. Apt*, [1948] P. 83.

⁴ Staudinger-Firsching, Art. 11, note 77 with numerous references.

⁵ See Rigaux, *Droit international privé* (1968), No. 276.

⁶ Batiffol, *Traité de droit international privé* (5th ed., 1971), No. 426.

⁷ Marriage Act 1949, First Schedule, Part I.

⁸ *Cheni v. Cheni*, [1965] p. 85.

⁹ They are quoted without disapproval by Dicey and Morris, *Conflict of Laws* (9th ed., 1973), p. 73.

¹⁰ This was first developed in *The Growth of Internationalism in English Private International Law* (1960), pp. 39-46.

¹¹ See above, p. 125 n. 2.

¹² This word (or a similar phrase) frequently occurs in the discussion. See, in particular, Morris, *Conflict of Laws* (1971), pp. 230-1, where the learned author speaks of an intention

public policy?'¹ This is an excellent example of a tendency which it is most important to resist. We assume that in arranging their affairs so as to avoid the Hague Rules the parties did not, under the relevant legal system, commit an illegality. They therefore acted lawfully. They acted at the same time contrary to what one may legitimately describe as a tenet of political policy, viz. the unification of commercial laws. To stigmatize lawful, but politically undesirable, conduct as contrary to public policy would be a new departure which would be both opposed to English legal tradition of proven worth and pregnant with manifold dangers. Public policy, we know, does not preclude a decision which involves the approbation of the breach of a treaty to which the United Kingdom is a party.² Still less does public policy preclude a decision which involves the ratification of a mere infringement of the policy underlying a treaty concluded by the United Kingdom.

At this point there arises, finally, the very difficult question whether section 1 (3) of the Law Reform (Personal Injuries) Act 1948,³ yields a rule of public policy. We know from *Sayers v. International Drilling Co.*⁴ that the section does not apply where a contract of employment made in England between a Dutch employer and a British employee for employment in Nigeria is subject to Dutch law.⁵ But suppose the same contract had designated England to be the place of work and the accident had occurred here. Or, to go a small step further, suppose the employer had entered into the contract through a branch maintained in England. Would the application of the section be excluded and would the defence of common employment, assuming it to be part of Dutch law or to be effectively introduced into the contract by an express term, be allowed to prevail? Collins⁶ tentatively suggested that, though the Act of 1948 does not contain penal sanctions or render an infringing contract illegal, 'a cautious and sparing use of the public policy doctrine is appropriate where the application of English law would not violate the interests of any other State or the legitimate expectations of any party or where justice demands it'. Now it must be admitted that long before 1948 the defence of common employ-

'to avoid the mandatory provisions' or of the parties 'pretending that they are contracting under another law'. The solutions suggested in the text are meant to hold good even if the parties specifically intended to evade the Hague Rules. No legal relevance attaches to any pejorative description.

¹ Dicey and Morris, *Conflict of Laws* (9th ed., 1973), p. 822.

² See Mann, *Studies in International Law* (1973), p. 341, and such cases as *Collco Dealings Ltd. v. Inland Revenue Commissioners*, [1962] A.C. 1.

³ For the text see above, p. 126.

⁴ [1971] 1 W.L.R. 1176.

⁵ Collins, *International and Comparative Law Quarterly* (1972), p. 320, at p. 332, would even in this case be inclined to resort to public policy in order to give effect to s. 1 (3). This would clearly be unacceptable. The fact that the plaintiff is British and that the contract was made in England does not clothe the law of England with sufficient authority to interfere with a Dutch contract.

⁶ Loc. cit. (in the preceding note). But see the rejection of *ordre public* in the German decisions referred to above, p. 127 nn. 1, 2.

ment had been almost universally condemned as an unjust piece of judicial legislation which, most unfortunately, the courts of this country had found impossible to overturn. The main reason for the condemnation was, not the fear that the defence created or constituted a great social evil such as child labour or excessive working hours, but the fact that it rested on a fiction which imputed wholly unrealistic intentions to the parties. It is for this reason that, not without hesitation, it is submitted that the Act of 1948 should not be treated as being *d'ordre public*. Where an employee freely and voluntarily consents to an express clause¹ and this does not involve the imposition of a social evil or an absolute injustice, there is no need for curtailing the parties' freedom.²

V

In conclusion it may be helpful to summarize the results to which the preceding discussion has led:

1. Statutory provisions of the conflict of laws may be general or particular; the latter indicate the circumstances in which English law is to be applied.

2. Particular conflict rules do not in England lend themselves to conversion, by way of analogy or extensive interpretation, into general conflict rules. It is only where a common law rule is not yet established that a particular conflict rule contained in a statute may be treated as one of the elements in the formation of a general conflict rule.

3. Self-limiting provisions are not conflict rules, but rules of substantive or internal English law. Accordingly they are applicable only if the law to which the conflict rule refers is English. It is for this reason that, for

¹ Strictly, this does not happen where the exemption arises from the foreign legal system rather than the terms of the contract. Yet a party to a foreign contract must be taken to know the foreign law or to accept the consequences of the failure to make inquiries.

² The point discussed in the text arose, but was regrettably not dealt with, in the Scottish case of *Brodin v. A/R Seljan*, [1973] Scots L.T. 198. A seaman of Norwegian nationality, but resident in Scotland was employed on board an oil tanker belonging to Norwegian shipowners. The contract of employment was made in England. The seaman suffered an accident in Scottish territorial waters as a result of the owners' alleged negligence. The defendants argued that the action should be dismissed on the ground of 'the proper law of the contract of service . . . being the law of Norway and any rights or remedies available . . . under any other system of law being effectively excluded thereunder'. The exemption clause was therefore alleged to stem from the foreign law rather than the contract governed by it. Notwithstanding this difference, *prima facie* the view taken by the majority in *Sayers*' case (above, p. 126), would have required a decision to the effect that the question whether the Act of 1948 could be excluded depended on the law of contract rather than tort. Lord Kissen, however, did not discuss the question of classification, but distinguished *Sayers*' case on the ground that in the case before him 'the accident occurred in Scotland where s.1 (3) of the said Act of 1948 is part of the law relating to delicts'. For the purpose of answering the question of classification the place of the tort surely was irrelevant. It may have been, though it probably was not, relevant within the context of public policy. Yet this problem was not even alluded to. *Brodin*'s case does not, therefore, contribute to the further development of the law.

example, the Carriage of Goods by Sea Act and the Hague Rules included in it have to be considered only if the contract of carriage is subject to English law. There is no such rule as that according to which an English court is allegedly required (or permitted) simply to apply the statute.

4. Self-limiting statutory provisions may be express or implied. Where they are not expressed they will usually have to be implied in accordance with established principles of statutory interpretation. The cases decided under the Variation of Trusts Act 1958, failed to do so and are therefore open to criticism.

5. Self-limiting terms forming part of a foreign *lex causae* will have to be applied by an English court in the same manner and sense as a court sitting in the country of the *lex causae* would apply them.

6. There exist certain statutory provisions which include as a self-limiting term, conceptions peculiar to the conflict of laws. These are provisions of internal law. They should not cause any real difficulty.

7. In at least one case, namely s. 55A of the Sale of Goods Act as amended, the legislator has provided that, as a matter of public policy, English law shall prevail, although the contract is governed by a foreign legal system.

8. In a number of cases the legislator has provided that, whether or not the contract is subject to English law, its statutory provisions shall, in certain conditions, prevail.

9. The policy underlying a statutory provision is capable of yielding a rule of public policy, but in fact this is unlikely to occur. There is no case in which it has, or ought to have, occurred.

10. Subject to certain exceptions, the established principle prevails, and should continue to prevail, according to which, like a comparable rule of English common law, a statute forming part of English substantive law, whether it be mandatory in character or not, cannot be taken into account by an English court except where English law applies. Similarly, as a general rule, the application of a foreign statute presupposes the application of foreign law.

JURISDICTION IN INTERNATIONAL LAW*

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PART I. EXECUTIVE JURISDICTION

PART II. JUDICIAL JURISDICTION

1. CRIMINAL TRIALS
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BECAUSE the word 'jurisdiction' is used by different writers to denote a wide variety of different things, it seems advisable to start by defining the senses in which the word is used in the present article. The first three parts of the article deal with the power of one State to perform acts in the territory of another State (executive jurisdiction), the power of a State's courts to try cases involving a foreign element (judicial jurisdiction) and the power of a State to apply its laws to cases involving a foreign element (legislative jurisdiction). The fourth part represents, in effect, the other side of the coin and examines the question whether States are under a legal duty to recognize the exercise of jurisdiction by other States.

PART I. EXECUTIVE JURISDICTION

Not every act by one State in the territory of another State is contrary to international law; common sense suggests that the representative of one State who signs a commercial contract in another State is not acting contrary to international law. Even if the act is contrary to the local State's law,

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it is not necessarily contrary to international law (e.g. breach of a commercial contract).¹ The act is contrary to international law only if it represents a usurpation of the sovereign powers of the local State.

... a State ... may not exercise its *power* in any form in the territory of another State.²

Sovereignty ... in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.³

The act of one State in the territory of another may usurp the sovereign powers of the latter either because of the nature of the act or because of the purpose for which the act is done. These two aspects will be dealt with in turn.

Acts illegal by their nature

An act by one State in the territory of another is forbidden by international law if it is, by its nature, an act which only the officials of the local State are entitled to perform, as opposed to an act which private individuals may perform. For instance, collecting taxes is something which can be done only by public officials, not by private individuals, and so the officials of one State are not allowed to collect taxes in the territory of another State.⁴ For the same reasons the officials of one State may not sit as judges⁵ or recruit soldiers (even as volunteers)⁶ in another State. In countries where postal services are a government monopoly, officials of foreign governments are not allowed to provide postal services.⁷

Problems arise in connection with acts which are regarded as governmental functions in some States but not in others. For instance, in common law countries anyone may serve a writ on a defendant in civil proceedings; in civil law countries writs are served by officers of the court. Common law countries do not object to foreign consuls' serving writs;⁸ civil law countries regard such activities as a breach of international law, and common law countries have not claimed that their consuls have any right to serve writs

¹ Spying in peacetime will almost certainly be contrary to the local State's law, but it is by no means clear that it is contrary to international law. See Oppenheim, *International Law* (8th ed., by H. Lauterpacht), vol. 1 (1955), p. 862; Cohen-Jonathan and Kovar, *Annuaire français de droit international* (1960), p. 239; and the anonymous note in *Columbia Law Review*, 61 (1961), pp. 1074, 1110-11. And see below, p. 150 n. 2.

² *Lotus case*, P.C.I.J., 1927, Series A, No. 10, at p. 18 (*italics added*).

³ *Island of Palmas case* (1928), R.I.A.A., 2, pp. 829, 838.

⁴ Moore, *A Digest of International Law* (1906), (hereinafter cited as Moore), vol. 2, pp. 319 et seq.; Hackworth, *Digest of International Law* (1940-4), (hereinafter cited as Hackworth), vol. 2, pp. 315-16; *Compagnie générale des asphaltes de France claim* (1903), R.I.A.A., 9, p. 389; *British Digest of International Law* (ed. by Parry, 1965-), (hereinafter cited as *British Digest*), vol. 8, p. 156.

⁵ Hyde, *International Law* (2nd ed., 1947), vol. 1, p. 641 n. 1; McNair, *International Law Opinions* (1956), vol. 1, pp. 70-1.

⁶ Moore, vol. 2, p. 362; *British Digest*, vol. 8, pp. 65-6.

⁷ Hackworth, vol. 2, pp. 316-17.

⁸ Hyde, *op. cit.* (above, n. 5 on this page), p. 644; Hackworth, vol. 2, pp. 118-19; Whiteman, *Digest of International Law* (1963-), (hereinafter cited as Whiteman), vol. 6, pp. 187-9, 195-6.

in civil law countries.¹ The acquiescence by common law countries in the face of the protests made by civil law countries demonstrates that the classification of an act, for the purposes of determining whether it constitutes a usurpation of sovereign power, must be made in accordance with the law of the local State, and not in accordance with the law of the acting State.²

Acts illegal by their purpose

An act by one State in the territory of another State may constitute a usurpation of the sovereign powers of the latter State by reason of the purpose for which the act is done. For instance, a State is normally allowed to seek information in the territory of another State, provided that no coercion is brought to bear on the persons providing information; but if the information is sought for the *purpose* of enforcing the first State's revenue laws, the inquiry is contrary to international law. The power to tax is a sovereign power, and no State may take any step to give effect to that power in the territory of another State.³ Similarly, a State may not inspect ships in a foreign port for the purpose of enforcing its own quarantine regulations,⁴ and may not conduct inquiries into the political loyalties of its nationals in a foreign State.⁵ In all of these cases the consent of the individuals providing the information is irrelevant; the act is a usurpation of the sovereign powers of the local State, which cannot be cured by the consent of private individuals.⁶ Equally it makes no difference whether a State employs its own officials to make inquiries or whether it hires private detectives, accountants, etc.; the act is illegal regardless of the status of the State's agent.

¹ *American Journal of International Law*, 56 (1962), p. 794; Jones, *American Journal of Comparative Law*, 12 (1963), pp. 231, 234. See also the judgment of the Austrian Supreme Court of 21 February 1961, I.L.R., vol. 38, p. 133; Mann, 'The Doctrine of Jurisdiction in International Law', *Recueil des cours*, III (1964-I), p. 9, at pp. 132-6; Collins, *International and Comparative Law Quarterly*, 21 (1972), p. 656, at pp. 657-8; and *J. R. Geigy AG. v. Commission* (1972), *Recueil de la jurisprudence de la Cour de justice des Communautés européennes* (hereinafter cited as *Recueil de la jurisprudence*), p. 787, at pp. 825-6, *Common Market Law Reports* (1973), pp. 637-8.

² See also *Kämpfer v. Public Prosecutor of Zürich* (1939), *Annual Digest*, 1941-42, p. 6.

³ Whiteman, vol. 6, p. 183; Mann, loc. cit. (above, n. 1 on this page), pp. 138-41.

⁴ Moore, vol. 2, pp. 13-14, 148-51; Hyde, op. cit. (above, p. 146 n. 5), p. 644.

⁵ International Law Association (hereinafter cited as I.L.A.) (1964), pp. 362-3.

⁶ Sometimes States do consent to other States' conducting such inquiries. The United States has frequently conducted such inquiries abroad, although it is not certain whether it would consent to other States' pursuing similar inquiries on United States territory; Switzerland has always resisted such activities by foreign States on Swiss territory, out of a desire to preserve Swiss banking secrecy (and also to preserve Swiss neutrality—allowing one State to conduct such activities on Swiss territory might lead to discontent from other States which were not granted similar privileges). France has sometimes prevented such inquiries (Angell, *Columbia Law Review*, 36 (1936), pp. 908, 910), and sometimes allowed them (Kiss, *Répertoire de la pratique française en matière de droit international* (1962-9), vol. 2, pp. 197-8; Bedjaoui, *Fonction publique internationale* (1958), pp. 607-8). The fact that States sometimes permit such activities does not alter the rule that the activities are contrary to international law in the absence of permission.

Similar considerations apply to the seizure of individuals or property. There is abundant authority for the proposition that it is a breach of international law for the agents of one State to seize an individual¹ or property² in the territory of another State. But in all the reported cases the seizure was carried out for the purpose of giving effect to the sovereign powers of the seizing State (e.g. prosecution or expropriation), and that is why the seizure was illegal. Common sense suggests that no breach of international law occurs if the seizure is made for a purpose which does not constitute a usurpation of the sovereign powers of the local State, e.g. if diplomats of State *A* arrest a man whom they suspect of burgling the embassy and hand him over to the authorities of State *B* for trial; such an act may be a breach of State *B*'s law, but it is an act which could equally well have been performed by private individuals, and does not reflect any intention on the part of State *A*'s diplomats to exercise sovereign powers in State *B*.

Individuals who have been seized in the territory of another State are not usually allowed to plead this fact as a bar to their prosecution;³ and owners of property which has been seized in another State are not usually allowed to rely on this fact in subsequent proceedings concerning the disposal of the

¹ Briggs, *The Law of Nations* (2nd ed., 1952), p. 312; Morgenstern, this *Year Book* 29 (1952), p. 265; O'Higgins, *ibid.* 36 (1960), p. 279; Fawcett, *ibid.* 38 (1962), p. 181; Kiss, *op. cit.* (above, p. 147 n. 6), pp. 193-5; de Schutter, *Revue belge de droit international* (1965), p. 88; *Iseli v. Public Prosecutor of Zürich*, I.L.R. 21 (1954), p. 80; *U.S. v. Sobell*, *ibid.* 24 (1956), pp. 256, 260; McNair, *op. cit.* (above, p. 146 n. 5), pp. 74-9; *Vaccaro v. Collier* (1931), *Annual Digest*, 1929-30, p. 283. Seizure by a private individual is not a breach of international law, but the State ratifies the act and assumes responsibility for it by keeping the individual in its custody: de Schutter, *loc. cit.* (above, in this note), pp. 100-2; Mann, *loc. cit.* (above, p. 147 n. 1), p. 130; cf. the *Hiss* case (Moore, vol. 2, pp. 384-9) and Akehurst, this *Year Book*, 43 (1968-9), pp. 59-66.

Different considerations apply to seizure in *terra nullius*: Kiss, *op. cit.* (above, p. 147 n. 1), pp. 267-71; Hunnings, *International and Comparative Law Quarterly*, 14 (1965), p. 431.

The rule that seizure in foreign territory is illegal is buttressed by certain corollaries to prevent evasion: *Colunje* claim (1933), *Annual Digest*, 1933-34, p. 250 ('... the police agent of the [Panama Canal] zone, by inducing Colunje by false pretences to come with him to the zone with the intent of arresting him there, unduly exercised authority within the jurisdiction of the Republic of Panama...'). See also *Journal de droit international* (1913), p. 1340, and *Iseli v. Public Prosecutor of Zürich*, I.L.R. 21 (1954), p. 80.

It is also illegal to transport a prisoner across the territory of another State: *Foreign Relations of the U.S.* (1887), p. 838; Moore, vol. 2, p. 373; Hackworth, vol. 2, p. 389; McNair, *op. cit.* (above, p. 146 n. 5), pp. 79-82. For a possible exception, see *Attorney-General for Canada v. Cain*, [1906] A.C. 542, 546, P.C.

Forcible release of a person held in custody in a foreign State is also illegal, Moore, vol. 2, p. 376.

² Kiss, *op. cit.* (above, p. 147 n. 6), vol. 2, pp. 102-3; Oppenheim, *International Law* (7th edn., by H. Lauterpacht), vol. 2 (1952), pp. 755-7; *The Ship Richmond v. U.S.* (1815), 9 Cranch 102; Moore, vol. 2, pp. 4-5, 362-5; Hackworth, vol. 2, p. 306; *Giddings* claim (1868), Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (1898), (hereinafter cited as Moore, *History and Digest of . . . Arbitrations*), p. 4379.

³ See the articles by Morgenstern, O'Higgins, Fawcett and de Schutter (in n. 1 on this page); *Eichmann* case (1961-2), I.L.R., vol. 36, pp. 5, 57-71, 304-8; *Argoud* case, *Revue de droit public* (1964), p. 1259 (which goes against previous French cases); *U.S. v. Sobell* (1956), I.L.R., vol. 24, pp. 256, 260; *Ramotse* case, *The Times*, 1 October 1970.

property.¹ Despite isolated assertions to the contrary,² this practice does not mean that the seizure is lawful under international law; the seizure is illegal, but this issue can be raised only in diplomatic negotiations by the State where the seizure occurred,³ and not by the individual in municipal court proceedings. This practice has its dangers; there is no certainty that the government of the seizing State will be moved by diplomatic protests, and the possibility of censure by its own courts (which might have deterred it from carrying out the seizure in the first place) is not allowed to operate. But if the State where the seizure occurred acquiesces in the seizure, the breach of international law is cured;⁴ how then can the individual assert that the seizure was a violation of international law? Perhaps the best solution, *de lege ferenda*, would be for the municipal court to allow the State where the seizure occurred to intervene in the court proceedings if it wishes, and to order the release of the seized individual or property if that State so requests.⁵

Entry into the territory of a State without permission

According to Chief Justice Marshall in *The Schooner Exchange v. M'Faddon*, foreigners have a 'general licence . . . to enter the dominions of a friendly power', but this 'is never understood to extend to a military force'.⁶ This rule is based on obvious reasons of security—otherwise a force could enter for some apparently innocent purpose, and then turn round and overpower the State. Entry of armed forces into the territory of another State without the latter's permission is a clear breach of international law.⁷ Similarly intrusion of military aircraft into foreign air space is a breach of international law;⁸ and States which consider that foreign warships have

¹ Oppenheim, *op. cit.* (above, p. 148 n. 2), pp. 755-7; *The Ship Richmond v. U.S.* (1815), 9 Cranch 102; Moore, vol. 2, pp. 4-5, 362 et seq.; Hackworth, vol. 2, p. 306.

² *Foreign Relations of the U.S.* (1906), vol. 2, pp. 1121-2.

³ Or perhaps by the national State of the individual concerned; cf. the *Kosztka* case (1853), Moore, vol. 3, pp. 820 et seq.

⁴ But in some cases the arrest may be a violation of human rights, which cannot be cured by the acquiescence of the local State; see de Schutter, *loc. cit.* (above, p. 148 n. 1), pp. 121-2.

⁵ In *Ex parte Lopez* (1934), *Annual Digest*, 1933-34, p. 190, a United States District Court refused to allow Mexico to intervene in the trial of a man allegedly abducted from Mexico. But it is common practice for a neutral State to appear before a prize court to demand the release of a ship seized in neutral waters: Oppenheim, *op. cit.* (above, p. 148 n. 2), pp. 755-7.

⁶ (1812), 7 Cranch 116, 140-1. He said that warships constituted an exception, since they were usually allowed to enter foreign ports and thus had an implied licence; but he added that a State could, by express prohibition, exclude foreign warships; in other words, the express prohibition would override the implied licence.

⁷ Moore, vol. 2, pp. 362-71; Hackworth, vol. 2, pp. 282-306. This rule cannot be evaded by a force standing on its own side of the frontier and firing across it—such acts are equally contrary to international law: *ibid.*, pp. 282 et seq.; McNair, *International Law Opinions* (1956), vol. 1, pp. 79-80.

⁸ *Documents on International Affairs* (1949-50), p. 57; Wright, *American Journal of International Law*, 54 (1960), p. 836; *Columbia Law Review*, 61 (1961), pp. 1074, 1085-86.

no right of innocent passage through the territorial sea regard the entry of foreign warships into the territorial sea as a breach of international law.¹

Nowadays this rule must be regarded as applying to civilian servants of the State as well as to military forces.² Foreigners may have had a 'general licence' to enter a State's territory in 1812, but nowadays it is clear that a State is entitled to prohibit the entry of foreigners or of any class of foreigners. If one State sends its officials into another State against the latter's wishes, it is seeking to set at nought the latter's immigration policy, and to enforce its own policy in another State in substitution for that other State's policy—and this is clearly an inadmissible exercise of sovereign power in the territory of another State. Pushed to its limit, such conduct would constitute an attempt to deny to the other State the right to decide who should form part of its population; and this would be as serious a breach of international law as an attempt to take away the other State's territory or to change its form of government (territory, population and government being the three ingredients of statehood, according to orthodox theory).

Implied consent by the local State

When one State permits people holding official positions in another State to enter its territory in their official capacity, it may expressly *or by implication* authorize them to perform acts of sovereignty in its territory. Thus no objection is taken when heads of State, visiting foreign countries, continue to perform their official functions—signing decrees, appointing members of their own administration, etc.³ Likewise, by permitting an international organization to operate in its territory, a State impliedly consents to the organization's appointing officials by an act of authority—a technique of appointment which can normally be used only by the State.⁴

¹ *Foreign Relations of the U.S.* (1924), vol. 2, pp. 681-3; Kiss, *op. cit.* (above, p. 147 n. 6), vol. 4, p. 109; cf. the *Corfu Channel* case, *I.C.J. Reports*, 1949, pp. 4, 35 (passage which is not innocent is a breach of international law).

² *British Practice in International Law* (1967), p. 82 ('the presence of South African police in Rhodesia . . . was totally illegal and a violation of United Kingdom sovereignty'); judgment of Germany's Supreme Tax Court, 27 September 1933, *Reichssteuerblatt* (1933), pp. 1188, 1190 ('without the foreign State's permission the officials of the German Tax Office may not enter foreign territory. If . . . they do enter, they commit, contrary to public international law, a violation of the territory of the foreign State'). This may be a possible reason for regarding espionage during peacetime as illegal (cf. above, p. 146 n. 1); no State would knowingly permit a foreign spy to enter, and fraud by the spy concerning the reasons for his entry vitiates the State's consent. But in many cases a State may persuade residents of the other State to spy for it, or it may make use of officials who entered the other State for different purposes some time ago. The question of entry is not therefore very important.

Article 3(c) of the Chicago Convention, 1944, prohibits unauthorized overflight by all State aircraft, not merely military aircraft.

³ Rousseau, *Droit international public* (1953), p. 317. On governments in exile, see Oppenheim, *International Law* (8th edn., by H. Lauterpacht), vol. 1 (1955), pp. 326-7; Whiteman, vol. 6, pp. 354-5, 364; *Re Amand*, [1941] 2 K.B. 239, especially the statement by the Attorney-General.

⁴ Akehurst, *The Law Governing Employment in International Organizations* (1967), pp. 29-30, 34-6; Akehurst, *this Year Book*, 40 (1964), pp. 286, 290-1, 293-5.

What particular acts of sovereignty are permitted will vary according to the status of the officials concerned; a State which permits a foreign force to enter its territory will be regarded as impliedly permitting the commander of the force to impose disciplinary sanctions on his troops, but entry into diplomatic relations will not be regarded as impliedly permitting an ambassador to impose the same disciplinary sanctions (confinement to barracks, etc.) on his subordinates. But, even when the status of the officials concerned has been ascertained, the enumeration of those acts of sovereignty which are permitted is not always clear; *a priori* arguments about implied authorization often produce an unclear answer, and there is much to be said for an express detailed agreement between the two States concerned in order to regulate the matter. For instance, permitting a foreign force to enter territory implies that the foreign general may exercise disciplinary powers over his troops;¹ but how extensive is his power? In 1964 the United States Department of Defence said: 'The right of a friendly foreign force to exercise disciplinary jurisdiction over its members by means of service courts is implicit in its permitted presence in this country',² but in 1942 the Czech Military Court of Appeal in London held that Czech military courts in England had no right to try Czech soldiers unless *expressly* authorized by British law.³ Again, does the general's power extend to soldiers who have deserted and scattered themselves across the country?⁴ *A priori* theorizing does not provide a clear answer to such questions.

Similar uncertainties which previously surrounded the position of consuls have been dispersed by the Vienna Convention of 1963. Many of a consul's functions involve no exercise of sovereign power and therefore give rise to no difficulty (e.g. arranging legal representation for nationals of the sending State before courts of the receiving State). But as regards those of his functions which do involve an exercise of sovereign power, the Convention makes a distinction. Permission to exercise some of these functions (e.g. the power to issue passports and visas, and the powers over merchant ships exercised by a flag State's consul) is implicit in the acceptance of a foreign consul's appointment.⁵ In all other cases the Convention says that such functions may not be performed if they are prohibited by the law of the receiving State.⁶

¹ *The Schooner Exchange v. McFaddon* (1812), 7 Cranch 116, 139-40; Barton, this *Year Book*, 26 (1949), p. 380. Cf. *Wright v. Cantrell* (1943), *Annual Digest*, 1943-45, pp. 133, 140: 'the local sovereign, quoad the visiting force, must be deemed to waive . . . any laws prohibiting the carriage of arms or the wearing of uniforms other than its own'.

² *American Journal of International Law*, 58 (1964), p. 994.

³ *Annual Digest*, 1941-42, p. 123.

⁴ No, according to *Tucker v. Alexandroff* (1902), 183 U.S. 425, 433-4. During the First World War the United Kingdom and the United States apparently believed that the general's power extended only to his troops' camps: Barton (above, n. 1 on this page), pp. 392-3. For warships, see Colombos, *The International Law of the Sea* (6th edn., 1967), pp. 274-5.

⁵ Article 5 (d), (k), and (l).

⁶ Article 5 (f), (j), and (m).

PART II. JUDICIAL JURISDICTION

I. CRIMINAL TRIALS

*Territorial principle*¹

One of the main functions of a State is to maintain order within its own territory, so it is not surprising that the territorial principle is the most frequently invoked ground for criminal jurisdiction; even in continental countries, which also rely on the nationality principle to a far greater extent than common law countries, prosecutions based on the territorial principle far outnumber prosecutions based on the nationality principle.²

It often happens that a crime is committed partly in one country and partly in another; the example always given in textbooks is firing a gun across a frontier. At the turn of the century some writers argued in favour of conferring jurisdiction on the State where the crime was initiated, others argued in favour of conferring jurisdiction on the State where the crime was completed. But the arguments were so evenly matched that it was eventually realized that there was no logical reason for preferring the claims of one State over the claims of the other; and the only alternative to granting jurisdiction to neither State (which would have led to intolerable results) was to grant jurisdiction to both States. In some cases jurisdiction may be shared by more than two States, e.g. if *X* writes a fraudulent letter from State *A* to *Y* in State *B*, and *Y*, relying on the letter, sends money to *X* in State *C*.³

Logically a State should be able to claim jurisdiction only if the offence has been committed, in part or in whole, in its territory; it must prove that a constituent element of the offence occurred in its territory. This is the formulation adopted in the *Lotus* case,⁴ by the Harvard Research Draft

¹ The territorial principle is sometimes expressed by saying that a State has jurisdiction over crimes committed on its territory; but this prejudices the guilt of the accused. It would be more accurate to say that a State has jurisdiction over crimes *alleged* to have been committed on its territory. As soon as the prosecution concedes that the crime was not committed on the State's territory, the court no longer has jurisdiction under the territorial principle, and, unless it can establish jurisdiction under some other principle, it must stop the trial and release the accused.

² Donnedieu de Vabres, *Les principes modernes du droit pénal international* (1928), pp. 68 et seq.; Shearer, *Extradition in International Law* (1971), pp. 122-3; Hackworth, vol. 2, pp. 181-2; Kiss, op. cit. (above, p. 147 n. 6), vol. 2, p. 190.

³ Note that in this case the crime occurs in three States although, strictly speaking, the only physical act by *X* (writing and posting the letter) occurs only in the first State.

Similarly accomplices can be tried in the State where the principal offence occurred, even though they never entered that State: *American Journal of International Law*, 29 (1935), Supplement, pp. 503 et seq.; Stimson, *Conflict of Criminal Laws* (1936), pp. 78 et seq.; Merle and Vitu, *Traité de droit criminel* (1967), p. 207; *Naim Molvan v. Attorney-General for Palestine*, [1948] A.C. 351, 370-1; Income and Corporation Taxes Act 1970, s. 482 (5); *R. v. Robert Millar (Contractors) Ltd.*, [1970] 2 Q.B. 54; *Rivard v. U.S.* (1967), 61 AJIL 1967, 1065; *Bertschmann* (1955), I.L.R., vol. 22, p. 207 (Belgium); *Novic* (1955), ibid. 515 (Switzerland). The State where the accomplice committed his acts of participation has concurrent jurisdiction.

⁴ (1927), *P.C.I.J.*, Series A, No. 10, at pp. 23, 30.

Convention on Jurisdiction with Respect to Crime,¹ by Article 18 of the American Law Institute's *Restatement of Foreign Relations Law*, by the criminal codes of many countries² and by many judicial decisions in common law countries³ and elsewhere.⁴

Sometimes this rule has been stretched by using the device of the continuing offence. A thief who steals goods in State *A* and brings them to State *B* is regarded as having committed theft in *B* as well as in *A*, because theft is a continuing offence.⁵ Similarly a couple who commit bigamy in *A* and subsequently cohabit in *B* can be prosecuted in *B* as well as in *A*, because bigamy is deemed to be a continuing offence as long as the parties bigamously cohabit.⁶ This is clearly a legal fiction and goes against the logic of the law; but it is relatively harmless.

Some States, however, go considerably further, and claim jurisdiction over offences committed abroad which merely produce effects on their territory, even though those effects were not a constituent element of the crime. The list given in the commentary on the Harvard Research Draft Convention⁷ includes many states in the United States, Argentina,⁸ Mexico,⁹ China, Cuba, and Italy. Traces of the same approach can be seen in s. 1 (5) of the [English] Perjury Act, 1911, which provides that perjury by a person giving evidence before British authorities in foreign countries for the purposes of judicial proceedings in England shall be treated as if the perjury were committed in England; on similar facts, courts in Argentina¹⁰ and the United States¹¹ have openly based jurisdiction on the doctrine of effects. Other (non-perjury) cases in the United States¹² and Switzerland¹³

¹ Article 3; *American Journal of International Law*, 29 (1935), Supplement, p. 480.

² French Code of Criminal Procedure, Art. 693; *American Journal of International Law*, 29 (1935), Supplement, pp. 496 et seq.

³ *Halsbury's Laws of England* (3rd edn.), vol. 10, p. 318; *R. v. Baxter*, [1972] 1 Q.B. 1; *Treacy v. D.P.P.*, [1971] A.C. 537; *People v. Thomas* (1954), I.L.R., vol. 22, p. 295 (Ireland); *Mobarik Ali Ahmed v. State of Bombay* (1957), *ibid.*, vol. 24, p. 156; *Salinger v. Loisel* (1924), 265 U.S. 224.

⁴ e.g. The Netherlands (I.L.R., vol. 26, p. 209); Germany (Mann, loc. cit. (above, p. 147 n. 1), p. 85); Switzerland (*Journal de droit international*, 34 (1907), p. 518).

⁵ *Commonwealth v. White* (1970), *American Journal of International Law*, 65 (1971), p. 614; *R. v. von Elling*, [1945] A.D. 234; Stimson, *Conflict of Criminal Laws* (1936), pp. 103-14, 124-5. This is a rule of great antiquity: Donnedieu de Vabres, *Introduction à l'étude du droit pénal international* (1922), Chapter 4 and pp. 220-1, 251, 255. Cf. for stowaways on board ships, *Robey v. Vladinier* (1936), 154 L.T. 87, and for procuring, *R. v. Mackenzie and Higginson* (1911), 6 Cr. App. Rep. 64.

⁶ *American Journal of International Law*, 29 (1935), Supplement, pp. 491-2.

⁷ *Ibid.*, pp. 493-4, 497.

⁸ See also I.L.A. (1968), pp. 353-6.

⁹ See *Re Smith* (1956), I.L.R., vol. 23, p. 150.

¹⁰ *Re Homs*, *Annual Digest*, 1935-37, p. 253.

¹¹ *U.S. ex rel. Majka v. Palmer* (1933), 67 F. 2d 146; *U.S. v. Archer* (1943), 51 F. Supp. 708.

¹² *Hanks v. State* (1882), 13 Tex. App. 289; *Strassheim v. Daily* (1911), 221 U.S. 280, 285; *Ex parte Hammond* (1932), *Annual Digest*, 1931-32, p. 137; *Rivard v. U.S.* (1967), *American Journal of International Law*, 61 (1967), p. 1065. See also antitrust cases like *Alcoa*, below, pp. 193 et seq.

¹³ *Novic case* (1955), I.L.R., vol. 22, p. 515; Article 7 of the Swiss Penal Code provides that an offence is deemed to have been committed not only in the place where it is carried out, but also in the place where it takes effect.

also talk in terms of effects. Moreover, a man can be convicted of a crime in the State where the effects of his act are felt, even though his act was not a crime in the State where it occurred.¹

Once we abandon the 'constituent elements' approach in favour of the 'effects' approach, we embark on a slippery slope which leads away from the territorial principle towards universal jurisdiction. If, for instance, a man commits arson against a factory and the company owning the factory becomes insolvent as a result, the effects may be felt all over the world—losses may be suffered by the company's suppliers, customers and creditors, not to mention the dependants of the employees of the creditors' creditors. Clearly the line must be drawn somewhere. But where?

It is submitted that jurisdiction can be claimed only by the State where the primary effect is felt.² In order to determine whether the effects are primary or secondary, it is necessary to take two factors into account: (1) Are the effects felt in one State more direct than the effects felt in other States? (2) Are the effects felt in one State more substantial than the effects felt in other States? This test fits the decided cases, in the sense that jurisdiction has been claimed in practice only by States where the primary effects of an act have been felt. This test enables jurisdiction to be exercised by one or two³ States which have a legitimate interest in exercising jurisdiction, but it prevents the exercise of jurisdiction by States with no legitimate interest. The requirement of directness would, for instance, prevent jurisdiction's being based on the economic effects of a crime on the victim's

¹ *Hanks v. State; U.S., ex rel. Majka v. Palmer*. See also *People v. Chase* (1931), *Annual Digest*, 1931-32, p. 138; and see below, p. 157, on *fraude à la loi*. *Contra*, the *amicus curiae* brief filed by the Swiss government in the *Swiss Watches* case (quoted I.L.A. (1964), p. 576).

² Or, in the case of attempts and conspiracies, where the primary effect would have been felt if the offence had been consummated. A State has jurisdiction over attempts to commit a crime on its territory, even though the *actus reus* of the attempt occurred abroad (*American Journal of International Law*, 29 (1935), Supplement, pp. 506-8; *Mexican Federal Penal Code*, Art. 2; *Swiss Criminal Code* (1937), Art. 7; I.L.A. (1964), p. 576). English courts have jurisdiction to try conspiracies, even though the constituent elements (formation of the conspiracy) occurred abroad, provided that an overt act of implementation (which is not a constituent element of the crime of conspiracy) has occurred in England: *Director of Public Prosecutions v. Doot*, [1973] A.C. 807 (see especially Lord Salmon at pp. 835-36); *British Practice in International Law* (1967), p. 60. (United States federal cases like *Ford v. U.S.* (1926), 273 U.S. 593, 620, are not helpful, because in United States law, unlike English law, an overt act of implementation is a constituent element of the crime of conspiracy: 18 U.S.C. 88. But see Stimson, *Conflict of Criminal Laws* (1936), pp. 80-4.)

Thus the 'constituent elements' approach is not followed in the case of attempts and conspiracies (although presumably concurrent jurisdiction could be exercised by the State where the *actus reus* of the attempt occurred or where the conspiracy was formed).

³ The effects felt in two or more States may be equally direct or equally substantial; or direct but insubstantial effects in one State may be counter-balanced by indirect but substantial effects in another State. In such cases jurisdiction may be exercised by two or more States, but the number of States exercising jurisdiction is likely to be very small.

It is desirable to restrict jurisdiction to as small a number of States as possible, because there is no rule of international law against double jeopardy (see below, p. 166 n. 1), and because an act which is lawful in one country may be a crime in another country—it is unfair to expose an individual to the conflicting requirements of legal systems in distant countries.

creditors, dependants or employees. The requirement that the effects must be substantial would, for instance, prevent jurisdiction's being exercised over a radio station by every State where the broadcast was heard; jurisdiction could be exercised only by the State where the majority of the listeners lived.

In borderline cases it may be relevant to take the accused's intentions and motives into account. Thus, in the case of broadcasting, it would be legitimate to examine whether the broadcast was aimed at the country claiming jurisdiction.¹ Similarly, if a man built a high building near the frontier of one State which interfered with access by aircraft to an airport on the other side of the frontier, it would be reasonable to suggest that the State in which the airport was situated would have jurisdiction only if the builder's motive was to obstruct the aircraft. But, apart from such borderline cases, intentions and motives are irrelevant; many crimes, after all, do not require *mens rea*. Thus in the *Lotus* case Turkey was allowed to assume jurisdiction under the objective territorial principle over a crime of inadvertence.²

It is submitted that the 'primary effects' approach provides a better means of keeping the jurisdiction of States within reasonable bounds than the 'constituent elements' approach does. Take the example of broadcasting. The constituent elements of broadcasting a defamatory or seditious statement include, in most legal systems, the reception of the statement by a third person. Under the 'constituent elements' approach, jurisdiction could be claimed by any State where the statement was heard, which would produce absurd results.³ (One could take other examples besides broadcasting, e.g. polluting the atmosphere.) Moreover, if a State wishes to punish someone for causing certain effects, it can evade the restrictions imposed by the 'constituent elements' approach by creating a new offence, the constituent elements of which include the effects in question. Suppose *A* kills *B* in State *X*, leaving *B*'s widow in State *Y* destitute. *Y* cannot try *A* for murder; but it could create a new offence of causing the destitution of widows by killing their husbands, and try *A* for that. This would be lawful under the 'constituent elements' approach, because one of the constituent elements of the new offence (the destitution of the widow) has occurred in State *Y*. But it would not be lawful under the 'primary effects' approach, because the destitution of *B*'s widow is only an indirect and relatively non-substantial effect of *A*'s act.

¹ Cf. *Horwitz v. U.S.* (1933), *Annual Digest*, 1933-34, p. 192, and [U.K.] Representation of the people Act, 1949, s. 80. See also below, pp. 199-201.

² (1927), *P.C.I.J.*, Series A, No. 10, p. 24; cf. Jennings, this *Year Book*, 33 (1957), pp. 160-1.

³ Cf. *Journal de droit international* (1890), p. 498 (a man shouted *Vive la France!* on the French side of the Franco-German frontier and was convicted of sedition in Germany because his statement was heard in Germany).

Finally a few words should be said about liability for omissions. If a man undertakes by contract to do something in a particular State, he can be punished for breaking his contract; if he acquires property in a particular State, he can be punished for not paying taxes on it; by marrying a wife he undertakes to support her and can therefore be punished for not supporting her by the State where she resides.¹ But these examples have one thing in common—a voluntary undertaking (making a contract, acquiring property, marrying). In the absence of such an undertaking, it is submitted that a positive duty to act can be imposed only by the State where an individual is present or carrying on business at the time when action is called for²—otherwise jurisdiction over omissions, far from being based on the territorial principle, would in practice be based on the universality principle, because an omission cannot be localized and occurs everywhere simultaneously.

Nationality principle and other personal links

A State has jurisdiction over crimes committed by its nationals abroad. Some States require proof that the act is also criminal under the *lex loci*, or restrict jurisdiction to serious crimes or cases where the injured party or his government requests prosecution (e.g. France, Turkey); others do not (e.g. India, South Korea, Austria, Poland, U.S.S.R.). It would seem that such restrictions are not required by international law; a State has an unlimited right to base jurisdiction on the nationality of the accused.³ It should be noted, however, that the nationality of each accused must be considered separately; jurisdiction over an accused national does not carry with it jurisdiction over his alien accomplices.⁴

Common law countries claim jurisdiction on this ground over a comparatively small number of offences, but they have never objected to the wider claims made by continental countries; on the contrary, the United States has (by providing evidence, etc.) aided Greece and Italy to prosecute their nationals for crimes committed in the United States.⁵

Sometimes jurisdiction is based on some other personal link between the accused and the State claiming jurisdiction. For instance, Denmark, Iceland, Liberia, Norway, and Sweden claim jurisdiction over crimes committed abroad by their permanent residents. In a few cases the United

¹ *American Journal of International Law*, 29 (1935), Supplement, p. 489; George, *Michigan Law Review*, 64 (1966), pp. 609, 623-4.

² Cf. Mann, loc. cit. (above, p. 147 n. 1), p. 137 (a foreign witness can be summoned to appear only if he is in the State at the time of the summons). However, the intentions and motives of the accused may enable the State to extend its jurisdiction, especially in antitrust cases; see below, pp. 200-1.

³ *American Journal of International Law*, 29 (1935), Supplement, pp. 523-31.

⁴ *Ibid.*, p. 534.

⁵ Hackworth, vol. 2, pp. 203-5. In one or two cases the United States requested prosecution in the State of the offender's nationality, after that State had refused to extradite the offender to the United States.

Kingdom has also based jurisdiction on residence.¹ States often claim extraterritorial jurisdiction over members of their armed forces² and (in connection with crimes committed in the course of their duties) over their civilian officials.³ The United States⁴ and the United Kingdom⁵ also claim jurisdiction over crimes committed on foreign territory by members of the crews of their merchant vessels.

Common law countries have traditionally been reluctant to base jurisdiction on the nationality principle, or indeed on any principle other than the territorial principle, and the result is that they have sometimes pushed the territorial principle to absurd lengths in order to close gaps in their system of law enforcement. For instance, several states in the United States make it a criminal offence to leave the state with the intention of committing a crime outside the state.⁶ Donnedieu de Vabres defends these laws as necessary to prevent *fraude à la loi*—if an act (e.g. duelling) is illegal inside the State but legal in a neighbouring State, the State is entitled to prevent people evading its law by going to the neighbouring State and committing the act there.⁷ That may be so, but the State surely has a legitimate interest in preventing such acts only by its own citizens or residents, not by people who have merely passed briefly through its territory. It would be better, therefore, if the law asserted jurisdiction on the basis of residence and prohibited residents from doing certain acts abroad, instead of punishing some difficult-to-prove act (formation of intention) occurring inside the State's territory.⁸

Protective principle

During the nineteenth century continental countries began to claim jurisdiction over acts committed by aliens abroad which threatened the

¹ Slave Trade Act, 1824, s. 9; Exchange Control Act, 1947, s. 1 (1); Strategic Goods (Control) Order, 1959 (cf. *International and Comparative Law Quarterly*, 9 (1960), p. 266). Residence was one of the grounds taken into account in *Joyce v. D.P.P.*, [1946] A.C. 347 and *R. v. Neumann* (1949), *Annual Digest*, 1949, p. 239 (South Africa), but it would be dangerous to base any general conclusions on these cases. See, generally, *American Journal of International Law*, 29 (1935), Supplement, p. 533.

² *Restatement, . . . Foreign Relations Law of the U.S.* (1965), s. 31.

³ *American Journal of International Law*, 29 (1935), Supplement, pp. 539-41, citing the laws of many countries.

⁴ Moore, vol. 2, pp. 605-12. Sweden also claims such jurisdiction if the accused was acting in the course of his duties at the time of the crime.

⁵ Section 687 of the Merchant Shipping Act, 1894, is unduly wide in that it confers jurisdiction over 'any . . . seaman . . . who at the time when the offence is committed is, *or within three months previously has been*, employed in any British ship' (italics added). The language of the section, especially if read with s. 686, suggests that it applies to aliens, but the marginal note suggests otherwise. There is apparently no record of any prosecution under s. 687.

⁶ *American Journal of International Law*, 29 (1935), Supplement, pp. 485-6.

⁷ *Les principes modernes du droit pénal international* (1928), p. 391. For other examples of *fraude à la loi*, see *Annual Digest*, 1938-40, pp. 294-7 and *ibid.*, 1919-42, p. 172.

⁸ Some of the laws in question do apply only to residents, but jurisdiction is based, not on residence, but on some act (formation of intention) occurring inside the State's territory.

State. Such claims encountered initial opposition from the United Kingdom in 1852,¹ but this opposition soon ceased. Recently the United States has also begun to claim jurisdiction on this ground.²

The principle is well established, but the range of acts covered by the principle is not free from controversy. Articles 7 and 8 of the Harvard Research Draft Convention speak of crimes against the security, territorial integrity or political independence of the State, and the counterfeiting of the seals, currency, instruments of credit, stamps, passports or public documents issued by the State. The exercise of jurisdiction over these offences is unobjectionable, but some States make wider claims to jurisdiction. Article 13 of the Ethiopian Penal Law of 1957 speaks, *inter alia*, of offences against the servants or essential interests of the State. The Hungarian Penal Code spoke of offences against 'a fundamental interest relating to the democratic, political and economic order of the Hungarian People's Republic'.³ Laws drafted as widely as this are obviously open to abuse.

The decided cases also reveal examples of abuse. A Jewish alien who had sexual intercourse with a German girl in Czechoslovakia was convicted by a German court under the protective principle, because his act threatened the racial purity of the German nation.⁴ Now that such racial ideologies are discredited, this case is unlikely to constitute a precedent for the future. But the cold war has produced other abuses of the protective principle; an American was convicted in Czechoslovakia for doing research work for Radio Free Europe in West Germany,⁵ and foreign companies which buy United States goods and undertake not to re-export them to Communist countries can be prosecuted in the United States if they break that undertaking.⁶ French and Belgian courts convicted aliens who aided Germany abroad during both world wars; such decisions are defensible in cases where the accused persons were nationals of allied powers,⁷ but not in cases where nationals of neutral countries were convicted for acts done in their own countries.⁸

¹ McNair, *International Law Opinions* (1956), vol. 2, p. 150.

² *Rocha v. U.S.* (1961), I.L.R., vol. 32, p. 112; *U.S. v. Pizzarusso*, *American Journal of International Law*, 62 (1968), p. 975 (attempts to evade immigration restrictions). Cf. *U.S. v. Bowman* (1922), 260 U.S. 94 (acts designed to defraud the government; but the accused was a United States citizen and the Court left open the position of aliens).

³ Gorove, *American Journal of Comparative Law*, 3 (1954), pp. 82, 85.

⁴ Jessup, *Transnational Law* (1956), p. 50.

⁵ *The Times*, 19 December 1970.

⁶ No prosecutions have occurred, it seems, but the threat of them has proved very effective. See Berman and Gerson, *Columbia Law Review*, 67 (1967), pp. 791, 855-9 and 866-76, and Polier, *Columbia Journal of Transnational Law*, 9 (1970), p. 109. There is an extenuating factor in this case, because the undertaking could be regarded as a voluntary submission to United States jurisdiction.

⁷ *Nusselein v. Belgian State* (1950), I.L.R., vol. 17, p. 136; *Bayot* (1923), *Annual Digest*, 1923-24, p. 109. Cf. below, p. 159, on the protection of other countries.

⁸ *Re Urios*, *Annual Digest*, 1919-22, p. 107.

A State is entitled to impose its ideology on its nationals and on all persons present in its territory; it is also entitled to oblige both categories of persons to take its side in its struggles against other States. But it is not entitled to make such demands on aliens living in foreign countries. Any such attempt would be incompatible with the political independence of the State of the aliens' nationality or residence. The protective principle of jurisdiction loses all validity when it is used, not to safeguard the political independence of the State claiming jurisdiction, but to undermine the political independence of other countries.

In addition, the protective principle needs to be limited in the same way as the 'effects' doctrine¹—a State can claim jurisdiction only if the *primary* effect of the accused's action was to threaten that State. If this were not so, a State would be able to punish the editors of all the newspapers in the world for criticizing its government.

Before leaving the protective principle, reference should be made to the tendency of member States of military alliances to try offences against the security of one another. France tried offences against the security of her wartime allies.² Communist countries claim jurisdiction over offences against the security of other Communist countries,³ and in 1958 the Supreme Court of Bavaria upheld a conviction for revealing (in a foreign country) secrets about allied forces stationed in West Germany.⁴ The rationale for this jurisdiction is that the interests of the members of an alliance are so united that an act which threatens one threatens all. There does not seem to be any reason for regarding this type of jurisdiction as any more open to objection than the ordinary type of protective jurisdiction, except that there ought to be some evidence that the State most closely affected consents to (or at least acquiesces in) its allies' exercising jurisdiction on its behalf—otherwise, not only would this type of jurisdiction cease to be protective jurisdiction and resemble universal jurisdiction; it could also lead to the situation where some States decided for themselves what was best for another State, against the wishes of the latter, which would be incompatible with that State's political independence.

¹ See above, pp. 154–5. Nevertheless, the protective principle covers ground which is not covered by the 'effects' doctrine. For instance, if the accused counterfeits the currency of State *A* in State *B*, he cannot be tried in State *A* under the 'effects' doctrine unless the counterfeit currency is put into circulation in State *A*; but the mere act of counterfeiting State *A*'s currency, even if the counterfeit currency is never put into circulation, has a potentially adverse effect on State *A*, and this threat to State *A* justifies State *A* in claiming jurisdiction under the protective principle.

² Kiss, *op. cit.* (above, p. 147 n. 6), vol. 2, p. 180; *Re van den Plas* (1955), I.L.R., vol. 22, p. 205. Similar provisions exist in Article 5 of the South Korean Criminal Code.

³ *Soviet Law on Criminal Liability for State Crimes* (1958), Art. 10; *Bulgarian Criminal Code*, Art. 98; *Hungarian Criminal Code* (1961), Arts. 5 and 133.

⁴ *American Journal of International Law*, 52 (1958), p. 799.

Universality principle

For centuries there has been universal jurisdiction to try pirates.¹

War crimes are often mentioned as another example of universal jurisdiction, but until recently universal jurisdiction to try war crimes was a matter of controversy. Courts trying war crimes often used to think that war crimes were subject to the same jurisdictional rules as ordinary crimes;² even after the Second World War the Netherlands' courts held that international law authorized a State to try war crimes only if they were committed in its territory, against its nationals or against its national interests.³ However, in other war crimes trials which resulted from the Second World War, the courts of one allied nation frequently tried war crimes committed on foreign territory by foreign nationals against the nationals of other allied nations,⁴ or even against the nationals of enemy States themselves.⁵ Several commentators explained this by saying that States have a universal jurisdiction to try war crimes,⁶ and Israeli courts relied heavily on the universality principle in the *Eichmann* case.⁷

The Geneva Conventions of 1949 are generally interpreted as permitting (and indeed obliging) the exercise of universal jurisdiction, at least in the case of grave breaches;⁸ and national legislation passed to give effect to the Conventions often provides for universal jurisdiction.⁹

It has sometimes been suggested that, where multilateral treaties provide for the suppression of acts which are of concern to the whole world, universal jurisdiction exists over such acts. Thus Article 14 of the International Penal Law Treaty of Montevideo gives the captor State jurisdiction over drug trafficking, white slavery, and destruction of (or damage to)

¹ *In re Piracy Jure Gentium*, [1934] A.C. 586, 589.

² Manner, *American Journal of International Law*, 37 (1943), p. 407; Wright, *ibid.*, 39 (1945), pp. 257, 274-6; Carnegie, this *Year Book*, 39 (1963), p. 402. This attitude is probably explained by the fact that in many Continental countries war criminals are not charged with an offence against international law (as in English-speaking countries), but with an offence against the municipal criminal law of the State exercising jurisdiction, which seldom has a universal scope. See *Annual Digest*, 1947, pp. 292-5; Baxter, this *Year Book*, 28 (1951), p. 382; Woetzel, *The Nuremberg Trial* (1960), pp. 26-7, 32-3.

Cowles, *California Law Review*, 33 (1945), p. 177, argues that even in previous centuries jurisdiction was universal.

³ Rohrig, Brunner, and Heinze (1950), I.L.R., vol. 17, p. 393.

⁴ *Tesch* case (1946), *Annual Digest*, 1946, p. 250; Klein and others (1946), *ibid.*, p. 253. In the *Altstötter* case (1947), *ibid.* 1947, p. 278, a United States court tried an offence committed before the United States entered the war; and the International Military Tribunal at Nuremberg tried crimes against peace committed before the outbreak of the Second World War.

⁵ *Ohlendorf and others* (1948), *ibid.*, 1948, p. 656.

⁶ M. Sørensen, *Manual of Public International Law* (1968), p. 367.

⁷ (1961-2), I.L.R., vol. 36, pp. 26-42, 289-304.

⁸ Draper, *The Red Cross Conventions* (1958), p. 105; Lauterpacht, this *Year Book*, 29 (1952), p. 362; Yingling and Ginnane, *American Journal of International Law*, 46 (1952), pp. 393, 426. Röling, *Recueil des cours* (1960), vol. 100, pp. 323, 357-63, questions whether the drafters of the Convention intended to allow neutral States to try war crimes.

⁹ *International and Comparative Law Quarterly*, 7 (1958), p. 133; *International Studies*, 3 (1961), pp. 76-7; *Czechoslovak Criminal Code* (1961), Art. 19.

submarine cables. However, international conventions which provide for the suppression of such activities do not normally permit universal jurisdiction;¹ for example, no provision is made for universal jurisdiction over damaging submarine cables² or genocide.³ Universal jurisdiction is provided for (subject to certain conditions) in treaties or draft treaties against counterfeiting currency,⁴ terrorism,⁵ the drug traffic⁶ and apartheid;⁷ but, except in the case of the more recent treaties or draft treaties against terrorism and apartheid, universal jurisdiction is provided for only if the accused is in the territory of a State whose legislation recognizes as a general rule the principle of the prosecution of offences committed abroad by foreigners, and, as we shall see, not many States have legislation of this sort. (The pre-war treaties against terrorism and the drug traffic provide that participation in the treaty shall not be interpreted as affecting a party's attitude on the general question of the limits of criminal jurisdiction as a question of international law.)

Article 4 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft requires each party to take such measures as may be necessary to establish its jurisdiction over the offence in four cases, which include the case where the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board, and the case where the alleged offender is present in its territory and is not extradited.⁸ Hijacking is probably not covered by the definition of piracy in international law,⁹ but there is doctrinal authority for the view that it is subject to universal jurisdiction nevertheless;¹⁰ Japan in fact claimed universal

¹ *American Journal of International Law*, 29 (1935), pp. 476 et seq.; *Restatement, Second, Foreign Relations Law of the U.S.* (1965), p. 97.

² Rousseau, *Droit international public* (1953), p. 427.

³ Briggs, *The Law of Nations* (2nd edn., 1952), pp. 579–80. Do States have universal jurisdiction over genocide under customary law? See the *Eichmann* case (1961), I.L.R., vol. 36, pp. 34–8, and the criticism by Fawcett, this *Year Book*, 38 (1962), pp. 181, 205–8, and by Carnegie, *ibid.*, 39 (1963), pp. 402, 406–9.

⁴ *League of Nations Treaty Series*, vol. 112, p. 371, Art. 9.

⁵ Hudson, *International Legislation*, vol. 7, p. 862, Art. 10; *International Legal Materials*, 10 (1971), p. 255; *ibid.* 11 (1972), p. 977 (Art. 2), and p. 1382; *ibid.*, 13 (1974), p. 41.

⁶ *League of Nations Treaty Series*, vol. 198, p. 299, Art. 8; *United Nations Treaty Series*, vol. 520, p. 151, Art. 36. See also *Director of Public Prosecutions v. Doot*, [1973] A.C. 807, 817, *per Lord Wilberforce*.

⁷ *International Legal Materials*, 13 (1974), p. 50.

⁸ *Ibid.*, 10 (1971), p. 133. Article 5 of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (*American Journal of International Law*, 66 (1972), p. 455) contains the same provisions.

⁹ Shubber, this *Year Book*, 43 (1968–9), p. 193; but see Johnson, I.L.A. (1970), p. 732. Definitions of piracy in municipal law (e.g. *ibid.*, pp. 740–1) have little value (cf. Moore, vol. 2, p. 952); in the United States, Public Law 87–197, passed in 1961, creates an offence of aerial piracy (i.e. hijacking), but this offence is subject to the same jurisdictional limits as other crimes on board aircraft (see next paragraph of main text).

¹⁰ See the resolution passed by the Institute of International Law at its Zagreb meeting, 1971 and the Report of the International Law Association's Committee on Piracy (54th Conference, 1970), p. 737.

jurisdiction even before the Hague Convention.¹ Hijacking threatens international communications to the same extent as piracy; it is an attack on international order and injures the international community as a whole, which means that all States have a legitimate interest in repressing it. The policy reasons which justify universal jurisdiction over piracy justify it equally in the case of hijacking.

It is not only in the case of hijacking that States make wide claims to jurisdiction over crimes committed on board aircraft. Argentina, Belgium, Bolivia, Brazil, France, Lebanon, Luxembourg, Spain, and Turkey claim jurisdiction over crimes committed on board every aircraft which makes its first landing on their territory after the commission of the crime;² Argentina, Belgium, Bolivia, Chile, France, Lebanon, Luxembourg and Spain claim jurisdiction over crimes committed against their nationals on foreign aircraft.³ The [United States] Federal Aviation Act, 1958, as amended in 1961 and 1970, gives federal courts jurisdiction over crimes committed on board a foreign aircraft outside the United States 'which has its next scheduled destination or last point of departure in the United States, provided that in either case it next actually lands in the United States'. Article 4 of the Tokyo Convention on Offences and Certain Other Acts on Board Aircraft⁴ allows the exercise of jurisdiction on the basis of the effects doctrine, the passive personality principle and the protective principle.⁵

A number of States claim jurisdiction over crimes committed by foreigners in foreign countries, although some of them limit this jurisdic-

¹ *Japanese Annual of International Law*, 15 (1971), p. 70. The Australian law of 1963 (text in *Annuaire français de droit international*, 15 (1969), pp. 484-5) applies to all aircraft which started, ended, or should have ended their flight in Australia. Sweden tried a Greek for hijacking a Greek aircraft (flying from Crete to Athens) to Cairo: *The Times*, 1 July 1970. The Netherlands government, however, doubts whether universal jurisdiction applies to hijacking: *Netherlands Yearbook of International Law*, 3 (1972), pp. 209-10.

² *Annuaire français de droit international*, 4 (1958), pp. 129, 135. It is possible that the French law was intended to apply only to crimes committed while the aircraft was overflying France, but there are no cases interpreting the law. In 1972 the Canadian Criminal Code was amended to give Canadian courts universal jurisdiction over crimes committed on aircraft, provided that the accused is found in Canada (*International and Comparative Law Quarterly*, 22 (1973), p. 183).

³ I.C.A.O. Doc. 8111-LC/146-2, p. 165. Some of these States claim jurisdiction over crimes committed against their nationals on foreign territory (see below, pp. 163-6), but others do not.

⁴ The Tokyo Convention applies only to acts done on board aircraft registered in a High Contracting Party. The Hague and Montreal Conventions are not limited in this way—which, incidentally, strengthens the view that the Hague and Montreal Conventions are evidence of customary law (on this latter point, see Shubber in *International and Comparative Law Quarterly*, 22 (1973), pp. 687, 699-703, and on the relationship between treaties and custom in general, see D'Amato, *The Concept of Custom in International Law* (1971), chapter 5).

⁵ Text in *American Journal of International Law*, 58 (1964), p. 566. Shubber, *Jurisdiction over Crimes on Board Aircraft* (unpublished Ph.D. thesis, Cambridge, 1968), pp. 197-206, argues convincingly that Article 4 confers rights only on the subjacent State, because Article 4 regulates the right of a State to 'interfere with an aircraft in flight in order to exercise its criminal jurisdiction', and only the subjacent State can interfere with an aircraft in any case; but he overlooks the fact that the State over which the aircraft was flying when the offence was committed may not be the State over which the aircraft was flying when the interference occurred.

tion to cases where the victim of the crime was one of their nationals.¹ Courts in English-speaking countries do not claim such jurisdiction and describe it as contrary to international law,² and the governments of English-speaking countries have protested against the exercise of such jurisdiction by other countries on the grounds that it is not permitted by international law.³

The territorial principle is very deep-rooted in English-speaking countries, because originally the members of the jury were supposed to decide cases on the basis of their own knowledge of the facts, which meant that they could only try crimes committed in the place where they lived; jurisdiction based on other factors, such as the nationality of the accused, was adopted in English-speaking countries at a much later date and to a very small extent, while jurisdiction based on the universality and passive personality principles has always been regarded as totally unacceptable in English-speaking countries. Some writers from English-speaking countries imagine that the criminal law of all countries was originally based on the territorial principle, and that other bases of jurisdiction are recent (and usually questionable) innovations.⁴ But in many continental countries the universality principle is as ancient as the territoriality principle in England. It existed in medieval Italy,⁵ sixteenth-century Brittany,⁶ seventeenth- and eighteenth-century France until 1782,⁷ and seventeenth- and eighteenth-century Germany.⁸ It was supported by Grotius,⁹ Vattel,¹⁰ Paul Voet,¹¹ Huber¹² and Bynkershoek,¹³ not to mention lesser-known writers in sixteenth- and seventeenth-century Belgium.¹⁴ Countries claiming jurisdiction under

¹ The passive personality principle and the universality principle are often regarded as separate, but it seems more convenient to consider them together. States which object to one will also object to the other, while States which adopt the universality principle are unlikely to apply it in practice except when one of their nationals is the victim of the crime—in other cases their interest in punishing the offender will probably be too slight to justify the effort of prosecution.

² *U.S. v. Baker* (1955), I.L.R., vol. 22, p. 203; *Mortensen v. Peters* (1906), 8 F. (J.C.) 93; *R. v. Jameson*, [1896] 2 Q.B. 425, 430; and see below, p. 183. Contra, *Giles v. Tumminello* (1963), I.L.R., vol. 38, pp. 120, 123. In the early nineteenth century English courts claimed universal jurisdiction over slave traders, but this was soon abandoned: Fischer, *International Law Quarterly*, 3 (1950), p. 28.

³ *Foreign Relations of the U.S.* (1875), p. 123 and (1887), pp. 751–867, especially pp. 835–9; Hackworth, vol. 2, pp. 187–8; McNair, *International Law Opinions* (1956), vol. 2, pp. 149–54, 173–8; Whiteman, vol. 6, pp. 103–5.

⁴ e.g. Beckett, *this Year Book*, 6 (1925), p. 50.

⁵ Donnedieu de Vabres, *Introduction à l'étude du droit pénal international* (1922), pp. 130–1, 179–80, 182–4. Some Italian city States applied the passive personality principle (*ibid.*, pp. 127, 175–6).

⁶ *Ibid.*, pp. 221–2.

⁷ *Ibid.*, pp. 251–4, 364–7, 385 (only if the prosecution was brought by the injured party). The passive personality principle was applied from 1577 until some time in the eighteenth century: *ibid.*, pp. 233–5, 250, 363–4.

⁸ *Ibid.*, pp. 327–49.

⁹ *De iure belli ac pacis*, Book 2, ch. 21, paras. 3–6.

¹⁰ *Le droit des gens* (1758), book 1, ch. 19, sections 232–3.

¹¹ Donnedieu de Vabres, *op. cit.* (above, n. 5 on this page), p. 302.

¹² *Ibid.*, p. 306.

¹³ *Ibid.*, p. 307.

¹⁴ *Ibid.*, pp. 269, 270, 274–5.

the universality and/or passive personality principles in modern times include Argentina,¹ Austria,² Belgium,³ Bulgaria,⁴ Colombia,⁵ Czechoslovakia,⁶ Finland,⁷ Germany,⁸ Greece,⁹ Guatemala,¹⁰ Hungary,¹¹ Italy,¹² Japan,¹³ Mexico,¹⁴ Monaco,¹⁵ Peru,¹⁶ Roumania,¹⁷ San Marino,¹⁸ South Korea,¹⁹ Switzerland,²⁰ Turkey,²¹ Uruguay,²² Venezuela²³ and Yugoslavia.²⁴

On the other hand the English-speaking countries are not alone in regarding such jurisdiction as contrary to international law.²⁵ France is of the same opinion,²⁶ which was shared by individual judges in the *Lotus* case and by the arbitrator in the *Costa Rica Packet* case.²⁷ It is also significant that many countries believe that international law prohibits a State from trying crimes committed by foreigners on foreign ships within its ports, unless the crime disturbs the peace of the port,²⁸ which suggests *a fortiori* that a State cannot try crimes committed by foreigners on foreign territory (unless perhaps the effects of the crime are felt in the State claiming jurisdiction).

In a situation like this, where different States have different ideas about the content of the relevant rules of international law, there are two possible solutions. One is to fall back on the Soviet idea of custom as an implied agreement and to say that there are different rules of customary law in force between different groups of States. The other solution is to try to find some common ground between the two groups of States; and this common

¹ Extradition Law No. 1612 (1885), Art. 5.

² *Penal Code* (1852), s. 40. Universal jurisdiction has existed in Austria since at least 1803.

³ Law of 17 April 1878, Art. 10 (4) (which applies only in wartime).

⁴ *Criminal Code* (1951), Art. 67.

⁵ *Penal Code* (1936), Art. 7 (3).

⁶ *Criminal Code* (1961), Art. 20.

⁷ *Criminal Code* (1889), Ch. 1, s. 2.

⁸ *Criminal Code*, Art. 4; Hrenecek case, *University of Chicago Law Review*, 22 (1955), p. 797.

⁹ *Criminal Code* (1950), Art. 7.

¹⁰ *Penal Code* (1889), Art. 6 (6).

¹¹ *Criminal Code* (1950), Art. 4.

¹² *Criminal Code* (1930), Art. 10.

¹³ *Crown v. Yerizano* (1926), *Annual Digest*, 1925-26, p. 150.

¹⁴ *Federal Penal Code* (1931), Art. 4.

¹⁵ *Code of Criminal Procedure* (1904), Art. 8.

¹⁶ *Penal Code* (1924), Art. 5 (3).

¹⁷ *Criminal Code* (1968), Art. 6.

¹⁸ *Criminal Code* (1865), Art. 3 (3).

¹⁹ *Criminal Code* (1953), Art. 3.

²⁰ *Penal Code* (1937), Art. 5.

²¹ *Criminal Code* (1926), Art. 6.

²² *Penal Code* (1889), Art. 7.

²³ *Penal Code* (1926), Art. 4 (2).

²⁴ *Criminal Code* (1951), Art. 94.

²⁵ Many States refrain from claiming such jurisdiction, but it is dangerous to rely on such abstention in the absence of evidence of *opinio juris* on their part.

²⁶ France was, of course, the claimant State in the *Lotus* case. See also Kiss, *op. cit.* (above, p. 147 n. 6), vol. 2, pp. 184-5. But France applies the passive personality principle to crimes committed *in terra nullius*: Kiss, *ibid.*, vol. 1, p. 8 and vol. 2, p. 267 (an attempt to exercise jurisdiction on the universality principle over crimes committed *in terra nullius* was later abandoned); and cf. *American Journal of International Law*, 29 (1935), Supplement, pp. 586-91 and M. Sørensen, *Manual of Public International Law* (1968), pp. 371-2. France also applies the passive personality principle to crimes committed on board aircraft: Merle and Vitu, *Traité de droit criminel* (1967), p. 203.

²⁷ *Journal de droit international* (1897), p. 624.

²⁸ Particularly Spain (*Foreign Relations of the U.S.* (1923), vol. 1, p. 134), Netherlands (*ibid.* 142-3), Portugal (*ibid.* 170) and Italy (*Public Prosecutor v. Tarasco*, *Annual Digest*, 1929-30, p. 105).

ground may be easier to find if we examine the reasons why some States oppose the universality and passive personality principles and why others support them.

One suspects that the unstated reason for the attitude adopted by the United States, United Kingdom and French Governments is that they fear that in some other countries courts are biased and punishments inhuman. However, there are other rules of international law which guarantee a minimum international standard for the treatment of aliens, so one cannot invoke the possibility of jurisdiction's being abused as a reason for denying jurisdiction altogether. A stronger argument is contained in Brierly's famous statement: 'The suggestion that every individual is or may be subject to the laws of every State at all times and in all places is intolerable.'¹ But surely it is intolerable only if the laws vary from place to place; if they are the same in all countries the individual suffers little hardship.

Supporters of the universality and passive personality principles argue that States should work together for the punishment of crime and that the presence within a State of an unpunished criminal is socially dangerous.² But these arguments (particularly the first) presuppose that the act in question *is* a crime in all countries (or at least in the State where it was committed as well as in the State claiming jurisdiction); indeed, this is an assumption on which Grotius's whole argument is expressly based.

One solution would be for the State claiming jurisdiction to try the accused under the law of the State where the crime was committed.³ No State has applied this solution in modern times, but a number of States, while applying their own law, do require proof that the act in question was a crime under the law of the State where the act was performed.⁴ It is necessary to add a number of corollaries, to make sure that the accused is in the same position as he would have been if he had been tried in the State where the crime was committed. Thus periods of limitation laid down by the *lex loci* should be respected, and the penalty imposed should not be greater than the penalty imposed by the *lex loci*.⁵ The accused should also

¹ *Law Quarterly Review*, 44 (1928), pp. 154, 161.

² One would have thought that these ends would have been met more effectively by extradition or deportation, but there may be various reasons why extradition or deportation are not possible in a given case.

³ This happened in seventeenth- and eighteenth-century Germany; see Lipstein in *Jus Privatum Gentium, Festschrift für Max Rheinstein*, vol. 1, p. 411, at p. 413 n. 18. Sarkar advocates *de lege ferenda* the application of the 'proper law of the crime', which will often produce the same result; see *International and Comparative Law Quarterly*, 11 (1962), p. 446.

⁴ Knieriem, *Nürnberg, rechtliche und menschliche Probleme* (1953), p. 96, argues that the war crimes trials were illegal because they did not respect this principle. But if the prosecution can prove that an act is contrary to international law, this is surely an adequate alternative to proving that it is contrary to the *lex loci*.

⁵ These two requirements, like the requirement of double criminality, are set out in Article 10 of the Harvard Research Draft Convention, which also requires that the surrender of the alien should have been offered to the State where the crime occurred and that that State should not

be able to plead, as a bar to prosecution, the fact that he has already been tried in the State where the crime was committed.¹

The compromise outlined in the previous paragraph is a statement of what the author considers the law ought to be, rather than a statement of what the law is. However, in areas of international law where States disagree as to the content of the *lex lata*, statements of what the law ought to be can sometimes influence the actual content of the *lex lata*, especially when such statements take a middle course between two opposing views adopted by different groups of States. Admittedly it would be optimistic to suggest that the compromise outlined in the previous paragraph bridges the gap between the States which apply the universality and passive personality principles and the States which condemn those principles. The United States, the United Kingdom and France have opposed those principles even when they were applied subject to the restrictions set out in the last paragraph. Conversely, such restrictions² are accepted to a greater or lesser degree only by some of the States claiming jurisdiction under those principles (Austria, Czechoslovakia, Germany, Greece, Hungary, Mexico, Peru, South Korea, Switzerland, Uruguay) and not by others (Belgium, Colombia, Finland, Italy, San Marino, Turkey).³ However, it is to be hoped that greater understanding of one another's attitudes will in the future lead States to abandon their more extreme positions and to accept the compromise outlined in the previous paragraph as an acceptable rule of international law.

have accepted it. This last requirement, which exists in the laws of some countries and has a very ancient pedigree, reflects a belief that the universality principle should be used only when all other means of punishment are lacking.

¹ This is necessary to prevent his being in a worse position than he would have been if he had been prosecuted twice in the State where the crime was committed. It is an exception to the general rule of international law which allows a State to prosecute an individual even though he has already been prosecuted in another State. (In many States such prosecutions are impossible (*American Journal of International Law*, 29 (1935), Supplement, pp. 602-16; *New York University Law Review*, 34 (1959), pp. 1099-101), but not in all (*Annual Digest*, 1943-45, pp. 435-6; *ibid.*, 1949, p. 480; *I.L.R.*, vol. 26, pp. 704, 707, 712; *Rivista di diritto internazionale* (1967), p. 692; *Recueil de la jurisprudence* (1972), pp. 1281, 1296-8; *Common Market Law Reports* (1973), p. 190). The European Convention on the International Validity of Criminal Judgments (*International Legal Materials*, 9 (1970), p. 450), Arts. 53-5, prohibits such prosecutions (with certain exceptions), and the Council of Europe's Explanatory Report on the Convention says that the prohibition is laid down by treaty precisely because it is not adequately safeguarded in existing practice.)

² These restrictions make the prosecutor's task much more difficult, so that prosecutions are likely to be less frequent. But, even when these restrictions are not applied, prosecutions under the universality and passive personality principles are rare—the absence of witnesses and other evidence makes it difficult to try people for crimes committed abroad. See also the authorities cited above, p. 152 n. 2.

³ Most laws claiming jurisdiction under the universality principle expressly mention some or all of these restrictions, and most laws claiming jurisdiction under the passive personality principle do not expressly mention them, but there are a number of exceptions to these tendencies (*American Journal of International Law*, 29 (1935), Supplement, pp. 574-6, 578-9, 582). One suspects that States seldom transgress these restrictions in practice, even though the restrictions may not be expressly mentioned in their laws.

Presumptions for or against jurisdiction

This may be an appropriate point to discuss an issue which assumed great importance in the *Lotus* case—does the onus of proof lie on the State which claims that it is entitled to exercise a particular kind of jurisdiction, or does it lie on the State claiming that such jurisdiction is illegal? The Permanent Court of International Justice held that it fell on the latter State.¹ This view has been attacked by several writers, particularly Beckett,² although Beckett's arguments are weakened by an inaccurate analysis of the history of international law.³ The fact that States are often sparing in their claims to jurisdiction is not particularly significant, because their failure to claim certain types of jurisdiction may be due to reasons other than a belief that such jurisdiction is contrary to international law (e.g. the functions of the jury in early English criminal law). What *is* significant is the fact that writers almost always list specific heads of jurisdiction, thereby implying that all other types of jurisdiction are illegal, instead of simply stating the general presumption that all types of jurisdiction are legal and then listing specific heads of jurisdiction which are proved to be illegal.

In fact the number of cases where the question of onus of proof has been raised is remarkably small; even the Israeli Supreme Court in the *Eichmann* case, which relied heavily on the *Lotus* ruling about onus of proof,⁴ also invoked more positive arguments to establish Israeli jurisdiction. The question of onus of proof hardly arises in cases where State practice is more or less uniform, or where there are relevant analogies or arguments of principle which point clearly in one direction. In other words, the question only arises in specialized or unusual situations where the authorities are few and/or contradictory—such as the situation which gave rise to the *Lotus* case itself.⁵

*Conflicts of jurisdiction*⁶

Since several States can exercise concurrent jurisdiction in many cases, it can happen that an individual is forbidden by one law to do an act which

¹ (1927), *P.C.I.J.*, Series A, No. 10. Jennings, *Recueil des cours*, 121 (1967), pp. 517–18, rightly points out that many people have read too much into the *Lotus* case, but he does not quote the Court's ruling on the question of the onus of proof in criminal cases, which appears on pp. 36 (fourth and fifth paragraphs) and 37 of the judgment.

² This *Year Book*, 6 (1925), p. 50. See also *I.L.A.* (1964), p. xxviii.

³ See above, p. 163.

⁴ (1962), *I.L.R.*, vol. 36, pp. 283–7.

⁵ The question of the onus of proof of customary law can, of course, arise in many areas of international law and not only in the context of jurisdiction. Since the question is not of great practical importance in the context of jurisdiction, it would appear that the *P.C.I.J.*'s dictum in the *Lotus* case ((1927), Series A, No. 10, at p. 18) that 'restrictions upon the independence of states cannot . . . be presumed' is likely to be more influential in other areas of international law. Whether this dictum holds true of customary international law as a whole raises issues which are too vast to be explored in the present study.

⁶ Similar problems can arise in antitrust law; see below, pp. 207–8.

is permitted or even required by another law. In extreme cases the actual content of the law of one of the States concerned may be contrary to international law, or it may be possible to show that the law in question represents an abuse of legislative power and thus a breach of international law.¹ But, apart from such extreme cases, there is probably no way of resolving the conflict, because 'international law . . . does not provide for choosing among competing bases of jurisdiction to prescribe rules of conduct'.² United States courts have traditionally refrained from ordering defendants to perform acts which would violate foreign law, but there is no evidence that they regard such restraint as being required by international law.³

Some writers have suggested that it is contrary to international law to forbid an individual to behave in a way which is required by the law of the place where the act is performed;⁴ a few writers extend this principle to acts which are merely permitted by the *lex loci*.⁵ The result of this suggestion is that the territorial principle would always override the nationality principle and other principles of extraterritorial jurisdiction in the event of conflict.⁶ But the idea that a State may not forbid an individual to behave in a way which is required by the *lex loci* (or vice versa) is supported only by one statement made by the British Government, which dealt with anti-trust law rather than criminal law.⁷ As for the idea that a State may not forbid an individual to behave in a way which is permitted by the *lex loci*, there is no judicial authority or State practice to support it, and quite a lot to contradict it.⁸ One of the reasons why States claim jurisdiction under

¹ See below, pp. 188-90.

² *Restatement, Second, Foreign Relations Law of the U.S.* (1965), p. 112. The *Restatement* suggests factors which States should take into account to avoid conflicts (s. 40), but it is doubtful whether s. 40 represents the existing law (Metzger, *New York University Law Review*, 41 (1966), pp. 7, 18-20. In *U.S. v. First National City Bank* (*International Legal Materials*, 7 (1968), p. 1133) a United States Court of Appeals quoted s. 40 with approval, but without suggesting that it represented international law.

³ *Columbia Law Review*, 63 (1963), p. 1441.

⁴ *American Journal of International Law*, 29 (1935), Supplement, p. 616 (limited to aliens and apparently stated *de lege ferenda*); Jennings, this *Year Book*, 33 (1957), pp. 151-2; Oppenheim, *International Law* (8th ed., by Lauterpacht), vol. 1 (1955), pp. 295-6. *Contra* Sorensen, *Manual of Public International Law* (1968), pp. 359-60; Mann, loc. cit. (above, p. 147 n. 1), pp. 153, 156.

⁵ Jennings, loc. cit. (in the preceding note). The commentary on the Harvard Research Draft Convention contradicts itself by making a jurisprudentially unsound distinction between acts which are permitted and acts which are not forbidden (*American Journal*, p. 557; and Sorensen, pp. 363-5, both cited in the preceding note).

⁶ This cannot be so in all cases; for instance, if the law of State *A* punished people who forged its currency abroad and if the law of State *B* required or permitted someone in State *B* to forge State *A*'s currency, *A*'s law ought to prevail because *B*'s is contrary to international law: *U.S. v. Arjona* (1887), 120 U.S. 479.

⁷ *British Practice in International Law* (1967), p. 60. See below, pp. 206-8. A man who is required by his national law to act in a manner contrary to the law of another State can avoid the difficulty by keeping out of a country whose laws are in conflict with those of his own. This solution may appear harsh, but it does respect the interests of both States, instead of requiring one to yield to the other.

⁸ *Foreign Relations of the U.S.* (1887), pp. 754, 770, 779; *Re di Lisi* (1933), *Annual Digest*, 1933-34, p. 193; *Trial of Earl Russell*, [1901] A.C. 446; *American Journal of International Law*, 29 (1935), Supplement, pp. 551, 553.

the protective principle is precisely because acts which threaten a foreign State are often not illegal in the State where they are performed. The United States requires United States companies operating in foreign countries to obey United States laws which prohibit certain kinds of trade with communist countries, even when the law of the country in which the company is operating permits such trade. (A different issue arises when the United States requires United States companies to order their foreign subsidiaries not to trade with communist countries—the subsidiary does not possess United States nationality, and such attempts by the United States to control the conduct of aliens abroad have been condemned by the Canadian Government as ‘an infringement of Canadian sovereignty’.¹)

Consequences of an excess of jurisdiction

The normal result of an excess of jurisdiction is a protest by the national State of the accused.² No example is known of protests being made by any other State, so it would seem that a State could claim jurisdiction over a stateless person with impunity.³ In fact the Soviet Union does claim jurisdiction over crimes committed by stateless persons in foreign countries, without requiring any proof that such acts were criminal under the *lex loci*.⁴

¹ H.C. Deb. (Canada) (1959), vol. 1, col. 618 (this statement arose out of an antitrust case, but the principle is equally applicable to legislation prohibiting trade with communist countries). The British Government apparently does not share the Canadian Government’s opinion: *British Practice in International Law* (1962), pp. 31–2, (1966), p. 20, (1967), pp. 24–7; but see *Hansard*, H.L. (1964), vol. 260, cols. 825–7, 1081, 1319.

The United States is sometimes prepared to refrain from enforcing these rules, at the invitation of the foreign government concerned: Brewster, *Law and United States Business in Canada* (1960), pp. 25–6.

Craig, *Harvard Law Review*, 83 (1970), p. 859, argues that the fact that the shares in the foreign subsidiaries are owned by United States nationals justifies the United States in treating the subsidiaries as possessing United States nationality. But he was writing before the *Barcelona Traction* case (*I.C.J. Reports*, 1970, p. 3) which defined the nationality of companies differently and showed a hostile spirit to piercing the corporate veil.

See, generally, Fugate, *Foreign Commerce and the Antitrust Laws* (1958), pp. 77–9; Berman and Gerson, *Columbia Law Review*, 67 (1967), p. 791 (especially 867–76); Stokes, *Proceedings of the Am. Soc. of International Law*, 64 (1970), p. 146. And see below, pp. 188–90.

² On the measure of compensation which the national State may claim, see the *Costa Rica Packet* case, *Journal de droit international* (1897), pp. 624, 625; McNair, *International Law Opinions* (1956), vol. 1, p. 248; Beckett, this *Year Book*, 6 (1925), pp. 44, 59–60. Any action (e.g. imprisonment, seizure of property) taken to enforce a judgment given without jurisdiction is also illegal and increases the amount of compensation which the wrongdoing State must pay.

³ But the United Kingdom Government would presumably argue that no State could punish even a stateless person for doing something in the United Kingdom which was required by the law of the United Kingdom: see above, p. 168 at n. 7.

⁴ Grzybowski, *Soviet Public International Law* (1970), p. 273. Article 10 (*d*) of the Harvard Research Draft Convention allows such jurisdiction to be exercised only in respect of crimes committed in a place not subject to the authority of any State.

2. CIVIL TRIALS

A State which denies foreigners access to its courts may be guilty of denial of justice. Conversely a State's jurisdiction is limited by rules about sovereign, diplomatic and other immunities. But, apart from that, are there any rules of public international law which limit the jurisdiction of a State's courts in civil trials?

Some writers have answered this question in the affirmative.¹ Brownlie even says that 'there is in principle no great difference between the problems created by assertion of civil and criminal jurisdiction over aliens'.² This is rather an extreme view; as John Bassett Moore argued *à propos* of the *Cutting* incident, 'the rules governing the jurisdiction in civil and in criminal cases are founded in many respects on radically different principles, and . . . an assumption of jurisdiction over an alien in the one case is not to be made a precedent for a like assumption in the other';³ and one might add conversely that limitations in criminal cases cannot be cited as authority for the existence of like limitations in civil cases. Of course, rejection of analogies drawn from criminal trials does not necessarily mean that international law imposes no limitations whatever on jurisdiction in civil cases—the limitations might simply be of a different kind. But it is worth remembering that Dicey believed that the only limitation on jurisdiction in civil trials was contained in the principle of effectiveness;⁴ and when one examines the practice of States, as will be done in the pages which follow, one finds that States claim jurisdiction over all sorts of cases and parties having no real connection with them and that this practice has seldom if ever given rise to diplomatic protests.

Temporary presence of the defendant

At common law the court of a State acquired jurisdiction *in personam* if (and only if) a writ was served on the defendant while he was in the State concerned. Although other bases of jurisdiction have been added by statute, this remains the main basis of jurisdiction in common law countries.⁵ What is remarkable is that the court's jurisdiction is not affected by the brevity of the defendant's stay in the country concerned;⁶ in theory a visit lasting

¹ Mann, loc. cit. (above, p. 147 n. 1), pp. 73-4; Bartin, *Principes de droit international privé* (1930), vol. 1, p. 113; Parry, *Transactions of the Grotius Society*, 44 (1958), pp. 109, 117-20.

² *Principles of Public International Law* (2nd ed., 1973), p. 292.

³ *Foreign Relations of the U.S.* (1887), pp. 757, 806.

⁴ *Conflict of Laws* (2nd ed., 1908), p. xxxi.

⁵ A company is regarded as present within the State if it transacts business in the State; but the business done in the State may be very slight and brief, and need not be connected with the subject-matter of the litigation.

⁶ This development may be historically unsound (Ehrenzweig, *Yale Law Journal*, 65 (1956), p. 289), but it represents the modern law.

a few seconds would be sufficient. It is true that an English court can halt proceedings when this is necessary to prevent injustice to the defendant;¹ but the fact that a writ has been served on a foreigner temporarily present in England is not necessarily regarded as a source of injustice.²

Service on someone who is present for only a few hours has been held to be sufficient to give jurisdiction in the United States, and the courts have made it clear that this rule applies 'when the party is in the State, however transiently'.³ In *Grace v. MacArthur* the defendant was served with process on board an aircraft flying over Arkansas, and this was held to give jurisdiction to the District Court in Arkansas.⁴ Recently, however, United States courts have often dismissed such cases on the grounds of *forum non conveniens*.⁵

In continental countries service of process is often required to give the defendant notice of proceedings, but it does not create jurisdiction; jurisdiction must exist already before a writ can be served (the most common basis of jurisdiction being the habitual residence of the defendant). The practice followed by common law countries is virtually unknown in other countries,⁶ and a judgment given by a court which based its jurisdiction solely on the temporary presence of the defendant would almost certainly be refused recognition outside the common law world. However, no State appears to have protested that such jurisdiction is contrary to international law, even though it is obvious that the practice followed in common law countries enables a State to exercise jurisdiction over cases and parties having no real connection with that State.

Forum patrimonii

A number of countries claim jurisdiction whenever the defendant has assets within the State concerned. In some States (the Netherlands, South Africa, many states in the United States⁷) jurisdiction is limited to the

¹ *Egbert v. Short*, [1907] 2 Ch. 205.

² *Colt Industries, Inc. v. Sarlie*, [1966] 1 W.L.R. 440, C.A.; *Baroda (Maharanee of) v. Wildenstein*, [1972] 2 Q.B. 283, C.A.

³ Rheinstein, *University of Chicago Law Review*, 22 (1955), pp. 775, 790; *Peabody v. Hamilton* (1870), 106 Mass. 217; *Darrah v. Watson* (1872), 36 Iowa 116; *Fisher v. Fielding* (1895), 67 Conn. 91 (enforcement of an English judgment—writ served on an American on the last day of his visit to England deliberately to embarrass him by making him stay or pay).

⁴ *American Journal of International Law*, 53 (1959), p. 696.

⁵ Cheatham and others, *Conflict of Laws* (5th ed., 1964), pp. 235 et seq. McClean, *International and Comparative Law Quarterly*, 18 (1969), pp. 931, 946–7, argues in favour of the same approach in England, but his argument is concerned with what the law ought to be, rather than what it is; see Collier, [1973] *Cambridge Law Journal*, p. 49, and *The Atlantic Star*, [1973] 2 W.L.R. 795.

⁶ Although Portugal appears to follow this practice in contract cases: *Recueil des cours*, 104 (1961), p. 217.

⁷ In the United States jurisdiction is limited to the value of the assets unless the defendant appears in order to challenge the claim on the merits—but this confronts the defendant with a harsh dilemma. See Cavers, *ibid.* 131 (1970), pp. 75, 295 et seq.

value of the assets; in other States (Austria, Belgium, Denmark, Germany, Scotland, Sweden, Japan, parts of Switzerland) it is not so limited.¹ As a result, a tourist who left his slippers behind in a hotel bedroom might find the local court claiming jurisdiction over all sorts of unrelated claims against him, running into millions of pounds. It is obvious that this rule enables a State to exercise jurisdiction over cases and parties having no real connection with that State, but no State seems to have protested that such jurisdiction is contrary to international law.

In *Pennoyer v. Neff* the United States Supreme Court said that public international law allowed such jurisdiction only if it was limited to the value of the assets; but the Court's reasoning is based in part on the absence of notice given to the defendant, and this is a separate issue.² Besides, presence of assets in the United States is enough to found United States bankruptcy jurisdiction, and jurisdiction is not limited to the value of the assets in the United States.³

The International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision, signed at Brussels on 10 May 1952, allows actions arising out of the collisions of ships (whether the collision occurred on the high seas or in the waters of a foreign State) to be brought where the defendant ship or a sister ship has been arrested; jurisdiction is not limited to the value of the ship. The Convention is in accordance with previous British and American practice.⁴

Nationality, domicile or residence of the plaintiff

Article 14 of the French Civil Code gives French courts jurisdiction if the plaintiff has French nationality.⁵ A similar rule existed in medieval

¹ Cavers, *Recueil des cours*, 131 (1970), p. 300; Mann, loc. cit. (above, p. 147 n. 1), p. 81; de Winter, *International and Comparative Law Quarterly*, 17 (1968), pp. 707, 708, 713. In Germany the defendant's assets include a claim for which the defendant could sue the plaintiff in German court: de Vries and Lowenfeld, *Iowa Law Review*, 44 (1959), pp. 306, 332-9.

² (1871), 95 U.S. 714. The French *Cour de Cassation* held in a divorce case on 11 November 1908 that public international law required notice to be given to the defendant: Sirey (1909), vol. 1, p. 572.

³ Nadelmann, *International and Comparative Law Quarterly*, 12 (1963), p. 684. See also *In re Compania Merabello San Nicholas S.A.*, [1973] Ch. 75.

⁴ C. J. Colombos, *The International Law of the Sea* (6th ed., 1967), pp. 343-5. The jurisdiction of English courts is equally wide in other fields of Admiralty law: *The Mecca*, [1895] P. 95. See also *The Windhuk* (1940), *Annual Digest*, 1938-40, p. 167 (Brazil); A. Ehrenzweig, *Private International Law: General Part* (1967), pp. 200-1; 17 and 18 Vict. c. 104, ss. 527-8.

In 1965 the Attorney-General of England said that 'the exercise of jurisdiction [*in rem*] based solely on the seizure of a foreign aircraft would not have any secure basis in international law in the absence of international agreement' (*British Practice in International Law* (1965), p. 31); but English courts exercise jurisdiction against ship-owners on this basis, and there seems to be no reason for not applying the same rule to aircraft. Seizure of an aircraft can cause inconvenience (a point which strongly influenced the Attorney-General), but so can seizure of a ship.

⁵ Mann, loc. cit. (above, p. 147 n. 1), pp. 79-81.

Belgium,¹ in the Netherlands until 1940² and in Greece until 1946.³ At the present day such rules exist in Haiti,⁴ Luxembourg,⁵ Quebec⁶ and Roumania.⁷ Courts in Portugal⁸ and the Netherlands⁹ claim jurisdiction on the grounds of the plaintiff's domicile.

Judgments given on the basis of such provisions are unlikely to be recognized in other countries. In 1883 an Italian court held that Article 14 of the French Civil Code was contrary to the law of nations,¹⁰ but Italian courts usually hold that it is merely contrary to Italian public policy, as a reason for not recognizing such French judgments.¹¹ There is no record of diplomatic protests concerning such grounds of jurisdiction.

Such jurisdiction may be unusual in proceedings *in personam*, but in the case of matrimonial proceedings it is normal. The traditional rule, not only in England but also throughout western Europe, was that jurisdiction was vested in the court of the husband's domicile.¹² This meant that, after the husband and wife had separated, the husband might acquire a new domicile in a country where his wife had never set foot and institute proceedings there against his wife. The tendency of modern legislation is to extend this privilege to the wife,¹³ instead of insisting that proceedings must be brought in the court of the defendant's domicile. At the present day the plaintiff's domicile or residence is a basis of jurisdiction in the majority of countries,¹⁴ and this has been accepted by the Hague Convention on the Recognition of Divorces and Legal Separations, 1970.¹⁵ Jurisdiction is claimed on the

¹ Defacqz, *Ancien droit belge* (1846), vol. 1, p. 237.

² *Journal de droit international* (1903), p. 690; *International and Comparative Law Quarterly*, 17 (1968), p. 707.

³ *Journal de droit international* (1911), p. 662; *Recueil des cours*, 104 (1961), pp. 208-9.

⁴ Mann, loc. cit. (above, p. 147 n. 1), p. 80.

⁵ Ibid.

⁶ Castel, *Conflict of Laws* (2nd ed., 1968), pp. 951, 953.

⁷ *Journal de droit international* (1887), p. 565.

⁸ T.M.C. Asser Instituut, *Statutory Private International Law* (1971), p. 170.

⁹ Ibid., pp. 33, 39.

¹⁰ *Journal de droit international* (1885), p. 464. On the meaning of the 'law of nations' see below, pp. 212-14.

¹¹ *Journal de droit international* (1889), p. 338; ibid. (1926), p. 1091. Similarly in Belgium: *Nederlands Tijdschrift voor Internationaal Recht* (1964), p. 26.

¹² Rabel, *The Conflict of Laws* (2nd ed., 1958), vol. 1, pp. 429-30.

¹³ In *Worth v. Worth*, [1931] N.Z.L.R. 1109 the New Zealand Court of Appeal suggested that jurisdiction based on anything other than the husband's domicile was contrary to international law, and the same approach can be seen in *Niboyet v. Niboyet* (1878), 4 P.D. 1, 20, in *Shaw v. Gould* (1868), L.R. 3 H.L. Cas. 55, 81-3, and in *Le Mesurier v. Le Mesurier*, [1895] A.C. 517, 527. This seems to show a confusion between public international law and the traditional English ideas of private international law; cf. below, pp. 212-14, 226-7, 232.

¹⁴ T. M. C. Asser Instituut, *Statutory Private International Law* (1971), pp. 36, 119, 131, 170, 190, 199; Rabel, op. cit. (above, n. 12 on this page), pp. 429, 432, 434, 453; A.L.I., *Restatement, Second, Conflict of Laws*, s. 71; *American Journal of Comparative Law*, 20 (1972), pp. 1, 16, 22-3; *Journal de droit international* (1966), pp. 783, 796; [English] Domicile and Matrimonial Proceedings Act 1973, s. 5; *Nederlands Tijdschrift voor Internationaal Recht*, 19 (1972), pp. 218, 227, 311, 332.

¹⁵ *International and Comparative Law Quarterly*, 18 (1969), p. 658; Cmnd. 4542. The Recognition of Divorces and Legal Separations Act 1971 gives effect to the Convention in English law.

basis of the plaintiff's nationality in a number of Eastern European countries, including Greece and Yugoslavia;¹ nationality of either spouse is a ground for recognition under the [English] Recognition of Divorces and Legal Separations Act 1971.

Title to foreign land

It has sometimes been suggested that it would be contrary to international law for a municipal court to decide title to foreign land.² But courts in Austria, Germany and Italy have done precisely this, without provoking diplomatic protests.³ English courts refrain from exercising such jurisdiction, probably because they realize the futility of giving a judgment which cannot be enforced against the wishes of the local State, but they circumvent this rule by means of the equitable jurisdiction *in personam*⁴ (French courts have also sometimes dealt indirectly with title to foreign land by exercising jurisdiction *in personam*).⁵

The idea that international law prohibits a municipal court from deciding title to foreign land probably arises from confusing ownership of land with sovereignty over territory.⁶ The fallacy in this reasoning is too obvious to require demonstration.

Jurisdiction based on subject-matter

One might imagine that it would be perfectly reasonable for a State to exercise jurisdiction over a case if the subject-matter of the case had a close connection with that State; if a State's courts can try crimes committed on the State's territory, why should they not try torts and breaches of contract committed on the State's territory? But Joseph Story⁷ argued, early in the nineteenth century, that jurisdiction *in personam* must be based on the

¹ I. Szászy, *Private International Law in the European People's Democracies* (1964), pp. 88, 352-3; *Journal de droit international* (1966), pp. 783, 796; *Recueil des cours*, 131 (1970), pp. 475-7; T.M.C. Asser Instituut, *Statutory Private International Law* (1971), p. 143. A similar rule exists in Swiss law: *Nederlands Tijdschrift voor Internationaal Recht*, 19 (1972), p. 333.

² Vattel, *The Law of Nations*, Book 2, s. 103; *Bhattacharchee v. Bhattacharchee* (1955), I.L.R., vol. 22, p. 197; L. van Praag, *Jurisdiction et droit international public* (1915), pp. 113-31 (this is the only limitation on jurisdiction in civil cases which van Praag recognizes, apart from sovereign and diplomatic immunity, etc.). Cf. the equivocal dicta in *British South Africa Co. v. Companhia de Moçambique*, [1893] A.C. 602, 624.

³ A. Nussbaum, *Principles of Private International Law* (1943), p. 206; Hackworth, vol. 2, pp. 81-2; *Journal de droit international* (1894), p. 893, (1932), p. 318; *Rivista di diritto internazionale*, 11 (1932), p. 234.

⁴ G. C. Cheshire (and P. M. North), *Private International Law* (8th ed., 1970), pp. 477 et seq., 497 et seq.

⁵ Sirey 1848. 2. 625; *Journal de droit international* (1877), p. 422. Van Praag, op. cit. (above), n. 2 on this page, p. 131, accepts this as lawful.

⁶ Van Praag, *ibid.*, pp. 113-31, makes this mistake.

⁷ *Commentaries on the Conflict of Laws*, Sections 539 et seq. See also Vattel, *The Law of Nations*, Book 2, s. 103.

physical presence of the defendant within the State's territory when proceedings are started. Certain passages in Story suggest that any other type of jurisdiction *in personam* is contrary to international law, although, on the whole, Story seems to have been more concerned with the question whether the judgment would be treated as a nullity in foreign courts, rather than with questions of international law.¹ Story's influence is reflected in a number of English and American judgments, which held that the subject-matter of a case was, by itself, insufficient to confer jurisdiction *in personam*,² and in the *Daylight* case the United States Government argued that public international law prevented Mexico's hearing a case involving an absent United States citizen whose ship had collided with a Mexican Government ship off the coast of Mexico.³

Story's attitude clearly does not represent modern international law, because at the present day a very large number of States claim jurisdiction founded on the subject-matter of cases (e.g. torts committed on the territory of the State concerned, contracts governed by its law, etc.).⁴ Moreover, there are obvious advantages in attributing jurisdiction to the State where the facts occurred, and whose law has the closest connection with those facts.

¹ Non-recognition of a foreign judgment does not necessarily indicate that the foreign court lacked jurisdiction according to public international law; foreign criminal judgments are hardly ever recognized, regardless of whether public international law permitted the foreign court to hear the case.

² Rheinsteint, *University of Chicago Law Review*, 22 (1955), pp. 775, 793; *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A.C. 670; *Phillips v. Batho*, [1913] 3 K.B. 25, 29-30; *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155. The interpretation of these judgments is not free from doubt; when they say (as some of them do) that such jurisdiction is contrary to international law, are they thinking of public international law or of traditional common law ideas of private international law? Cf. below, pp. 212-14, 226-7, 232.

³ *Foreign Relations of the U.S.* (1884), p. 359. The United States was trying to present a claim on the international plane on behalf of the shipowner, and Mexico was arguing that he ought to exhaust local remedies in Mexico first. If the Mexican contention had prevailed, the United States shipowner would have appeared in the Mexican court as plaintiff, and not (as the United States argument appears to suggest) as defendant—which only confirms the total illogicality of the attitude adopted by the United States Government.

In 1853 Attorney-General Cushing advised that Texas committed 'a usurpation of general sovereignty' by trying a case against a United States army officer who was not domiciled in Texas, had never been personally served, had never appeared before the court and had no property in the State (6 *Opinions of the Attorneys-General*, p. 75). The case concerned a tort which had been committed, at least in part, in Texas.

It was said in the *Idler* case (*U.S. v. Venezuela* (1885), Moore, *History and Digest of the International Arbitrations*, pp. 3491, 3511-12), that a judgment will be void unless the defendant in an action *in personam* is domiciled or served with process in the State claiming jurisdiction. But the question at issue was whether *Idler's* dispute with Venezuela (concerning goods shipped by *Idler* to Venezuela) was *res judicata*, not whether Venezuela had broken public international law by instituting proceedings against *Idler* in its own courts.

⁴ Smit, *International and Comparative Law Quarterly*, 21 (1972), pp. 335, 344-50; Cavers, *Recueil des cours*, 131 (1970), pp. 75, 286-95; Hague Convention on the Recognition and Enforcement of Foreign Judgments, 1966 (*International Legal Materials*, 5 (1966), p. 636), Art. 10 (4) (tort); T.M.C. Asser Instituut, *Statutory Private International Law* (1971), pp. 47, 79-80, 94, 96-7, 119, 152, 170, 189, 275, 307.

Conclusion

Story's attitude shows the danger of relying on *a priori* arguments. Indeed, such arguments can be used to justify opposite conclusions; for instance, the principle of sovereignty, which was interpreted by the Spanish Supreme Court to give the courts of each State jurisdiction over all civil actions brought in that State,¹ was interpreted by the Cuban Supreme Court to debar courts from hearing disputes between foreigners.² There are a number of examples of authors and municipal courts using *a priori* arguments to support alleged limitations on a State's jurisdiction in civil cases—limitations which are contradicted by the actual practice of States.³

The acid test of the limits of jurisdiction in international law is the presence or absence of diplomatic protests. Protests in civil cases are not as frequent or as well known as they are in criminal cases,⁴ but they do exist. However, when they are examined closely it will be seen that some of them are isolated protests against practices which are so general that the law must be taken to follow the general practice rather than the isolated protest;⁵ the other recorded protests seem to be directed more against the reasoning adopted by the foreign court than against the assumption of jurisdiction by the foreign court. For instance, Hackworth quotes a protest by the United States Government against a Panamanian judgment granting a divorce to a resident of the Panama Canal Zone;⁶ when one examines the text of the Panamanian judgment⁷ it becomes clear that what the United States was really objecting to was the Court's reasoning to the effect that the rights of the United States over the Canal Zone were limited to ensuring the operation of the Canal. If the Panamanian court had based its judgment on reasoning which did not call in doubt the status of the

¹ *Harry Winston Inc. v. Tuduri* (1961), I.L.R., vol. 34, p. 49.

² *Journal de droit international* (1906), pp. 226, 230.

³ See above, pp. 170 at n. 2, 172 at n. 2, 173 at nn. 10, 13 and 174 at nn. 2, 6. The Italian Court of Cassation held that it would violate the sovereignty of foreign States for an Italian court to hear a case concerning a collision between foreign ships in foreign territorial waters (*Annual Digest*, 1938-40, p. 298); but the courts of other countries would claim jurisdiction in such circumstances (see above, p. 172, and below p. 183 n. 11).

⁴ A possible reason for this disparity is suggested in Akehurst, *A Modern Introduction to International Law* (2nd ed., 1971), pp. 130-1.

⁵ In addition to the *Daylight* case, mentioned above, p. 175, reference should be made to an incident in 1865 when the Italian Government, invoking Mancini's nationality principle, protested that foreign courts had no power to appoint guardians for Italian children (except as a temporary measure): *La prassi italiana di diritto internazionale*, 1st series (1970), vol. 1, pp. 9-10. But in England and the United States the mere presence of the child within the territory of the State concerned is enough to give the court jurisdiction to appoint a guardian (Cheshire (and P. M. North), *Private International Law* (8th ed., 1970), Chapter 13; I.L.R., vol. 42, pp. 26, 29; A.L.I., *Restatement, Second, Conflict of Laws*, s. 79); many other countries will probably claim such jurisdiction on the basis of domicile or residence, even over children possessing foreign nationality.

⁶ Hackworth, vol. 2, pp. 172-3. A Canal Zone court refused to recognize a similar Panamanian judgment in *Lucas v. Lucas* (1964), *American Journal of International Law*, 59 (1965), p. 163.

⁷ *Registro judicial*, 22 (March 1936), pp. 404-5.

Panama Canal Zone the United States would probably not have protested; it is notorious that many United States citizens have obtained 'mail order' divorces in Mexico, but the United States has never protested to Mexico.

A similar case¹ arose in 1879 when a tort action *in personam* was brought in Portugal against certain British subjects for a collision ten miles off the Portuguese coast; Portugal claimed jurisdiction on the grounds that the collision had occurred in Portuguese waters. The British Government protested against 'the assumption of jurisdiction by Portuguese courts to deal with a suit *in personam* beyond the limit which could properly appertain to the Portuguese courts'. But the protest was dropped when it appeared that Portugal had an alternative ground for claiming jurisdiction—Portuguese law gave Portuguese courts jurisdiction over persons committing torts outside Portugal against Portuguese subjects. What the United Kingdom objected to was really not the assumption of jurisdiction by Portuguese courts, but the implication that the Portuguese territorial sea extended ten miles.

In practice the assumption of jurisdiction by a State does not seem to be subject to any requirement that the defendant or the facts of the case need have any connection with that State;² and this practice seems to have met with acquiescence by other States. (The very few protests which have been made were either misconceived or addressed to unrelated issues.) It is hard to resist the conclusion that (apart from the well-known rules of immunity³ for foreign States, diplomats, international organizations, etc.) customary⁴ international law imposes no limits on the jurisdiction of municipal courts in civil trials.

3. DISCOVERY OF DOCUMENTS

When attempting to enforce antitrust laws and to regulate the rates charged for shipping goods into or out of the United States, United States courts and administrative authorities have frequently ordered foreign defendants to produce documents situated abroad. Such orders have produced protests from foreign governments.⁵ Some of these protests argue that international law forbids the United States to order foreigners to produce documents situated abroad;⁶ others maintain that the order for discovery is contrary to international law because the United States had

¹ Cited by Parry, *Transactions of the Grotius Society*, 44 (1958), pp. 109, 119.

² See above, pp. 170-4. Other examples could be given; for instance, Austrian law allows a plaintiff to choose a forum unilaterally in an invoice.

³ In many cases all servants or agents of a foreign State are immune from suit in respect of acts done by them in the course of their duty; see below, pp. 240-4.

⁴ Treaties sometimes impose limits on jurisdiction; see in particular the E.E.C. Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments: *Journal officiel* (1972), L 299/32.

⁵ See, generally, Mann, loc. cit. (above, p. 147 n. 1), pp. 154-8.

⁶ I.L.A. (1964), pp. 403-5, 580-1; I.L.R., vol. 33, pp. 159-61.

no right to initiate the proceedings in the first place.¹ Other protests rely on both of these arguments² or equivocate between them.³

It is submitted that the first ground stated for the protests is misconceived. When a court or administrative authority has jurisdiction over a case, it must have power to order defendants to produce documents relevant to the case, even though the defendants are foreigners and the documents are situated abroad.⁴ The fact that the law or the government of the State where the documents are situated forbids discovery makes no difference in international law, although municipal courts often refrain from ordering discovery in such circumstances. If this were not so, a foreign corporation could transact business within a State and defeat all attempts by the authorities of that State to investigate whether the business was being carried on in accordance with local law by keeping its business records in another State whose law prohibited discovery. This applies not only to antitrust law, but to tax law and to laws enacted to protect the consumer—indeed, to the whole range of public and private law. When a court has the right to hear a case, it also has the right to compel discovery of all relevant documents; as in the constitutional law of the United States and the law of international organizations, the existence of an express power carries with it such implied powers as are necessary in order to enable the express power to be effectively exercised.⁵

The second ground stated for the protests is unexceptionable. When a court or administrative authority has no jurisdiction over a case in the eyes of international law, an order for discovery of documents or any other step taken to render the usurped jurisdiction more effective is equally illegal because it aggravates the initial illegality of assuming jurisdiction.⁶

¹ I.L.A. (1964), pp. 404, 579–81, 590; *British Practice in International Law* (1962), p. 17; Chayes, Ehrlich and Lowenfeld, *International Legal Process* (1968), p. 419; *University of Pennsylvania Law Review*, 111 (1963), pp. 1135–6.

² I.L.A. (1964), pp. 404–5, 569–70, 579–80, 584.

³ Mann, loc. cit. (above, p. 147 n. 1), p. 155.

⁴ The same rule applies when the foreigner appears as plaintiff: *The Consul Corfitzon*, [1917] A.C. 550, 555; *Société Internationale v. Rogers* (1958), 357 U.S. 197. It is uncertain whether the same rule applies to witnesses; service of a subpoena abroad may give rise to difficulties (Mann, loc. cit. (above, p. 147 n. 1), pp. 134–6), but that relates to the method of communicating the court's order and not to the legality of making the order. In any case, a subpoena can be served on the local branch of a foreign corporation; Mann, *ibid.*, cites *Ings v. Ferguson* as authority against this view, but, although the court did not order discovery in *Ings v. Ferguson*, it hinted that in other similar cases it might make such an order (I.L.R., vol. 31, pp. 219, 225). Probably a foreign witness can be ordered to produce documents only if either the witness or the documents are in the State at the time when the order is made; cf. above p. 156, on criminal liability for omissions.

⁵ Mann, loc. cit. (above, p. 147 n. 1), pp. 154–8; *Re Mitsui Steamship Co. Ltd.* (1962), I.L.R., vol. 33, pp. 158, 162; *Montship Lines Ltd. v. Federal Maritime Board* (1961), *ibid.*, vol. 32, p. 100; *Fontaine v. Securities and Exchange Commission* (1966), *International Legal Materials*, 5 (1966), p. 1003. See also above, pp. 167–9, and below, pp. 207–8.

⁶ On the substantive jurisdiction of the United States in antitrust cases, see below, pp. 190–212, especially pp. 203–6 on shipping rates.

PART III. LEGISLATIVE JURISDICTION

I. GENERAL PRINCIPLES

In criminal law legislative jurisdiction and judicial jurisdiction are one and the same. States do not apply foreign criminal law; even in those few cases where criminality under the *lex loci* is made a condition precedent for the extraterritorial application of the criminal law of the forum, the accused is acquitted or convicted of an offence under the *lex fori*. If the court has jurisdiction, it applies its own law; if the *lex fori* applies, then the court has jurisdiction (apart from cases of immunity, statutes of limitation, etc.).

In civil law legislative jurisdiction and judicial jurisdiction do not necessarily coincide. A court may have jurisdiction and yet apply foreign law; a State may legislate for cases which fall beyond the jurisdiction of its courts. Consequently the absence of limitations imposed by public international law on the judicial jurisdiction of States in civil cases does not necessarily indicate that there is a similar absence of limitations on legislative jurisdiction.

Limitations clearly exist as regards legislation in certain fields of what might loosely be described as public law, such as laws governing the methods of operating of public bodies. Only the State to which the body belongs can legislate for it. We may refuse to enforce a foreign judgment because we disapprove of the procedure followed by the foreign court, but we do not pass laws ordering the foreign court to follow a different procedure—to do so would be an intervention in the foreign State's domestic jurisdiction and a denial of its sovereignty and independence.¹ For the same reasons, a State may not apply its law to the employment relationship between foreign States and their officials.²

Limitations also apply to laws conferring sovereign or prerogative rights on the State, i.e. rights which cannot be exercised by private individuals in the State concerned. Tax is a good example; the power to tax can only be exercised by States, not by private individuals. Such laws can be applied only against people who have a close connection with the State concerned. What counts as a close connection will vary from context to context; if a foreigner visits a State for a couple of days, the State would be entitled to require him to register with the police, but not entitled to conscript him into the army.

Customary international law permits a State to levy taxes only if there is a genuine connection between the State and the taxpayer (nationality,

¹ See below, p. 250.

² Seyersted, *International and Comparative Law Quarterly*, 14 (1965), p. 31. The same rule applies to international organizations: Akehurst, *The Law Governing Employment in International Organizations* (1967), p. 12.

domicile, long residence, etc.), or between the State and the transaction or property in respect of which the tax is levied.¹ This rule is necessary to protect States against one another; if a man is forced to pay taxes to a State with which he has little connection, this means that he may not have enough money left to pay taxes to a State with which he has a real connection. The rule does not prevent double taxation (that can only be prevented by treaty), but it does restrict the number of States which may lawfully levy taxes.

The Supreme Court of Pakistan has held that international law prohibited Pakistan from taxing an Indian company resident in India in respect of its profits earned in India.² In the *Weil* case (1875) it was held that a forced loan levied on an alien in transit was illegal.³ Hyde says that a State breaks international law if it attempts 'to impose a tax on the person of an alien who has no actual residence within its domain' or 'to tax tangible property as such which happens to be merely temporarily therein and which belongs elsewhere'.⁴ At one time it was thought that international law prevented a State's taxing land held by its nationals abroad,⁵ but this view is no longer followed in practice.⁶

Expropriation is another example of a sovereign power. A State may expropriate property situated in its own territory; it may also expropriate property held by its citizens abroad,⁷ although such legislation is unlikely to be enforced by the courts of other countries.⁸ But it would clearly be contrary to international law for a State to pass such legislation concerning property held by foreigners abroad (the fact that such legislation will not be enforced abroad does not diminish its illegality); fortunately there seems to be no recorded example of such legislation.

Recently problems have arisen in connection with the Securities Exchange Act in the United States. This Act provides for criminal liability as well as civil liability; it also gives the Securities and Exchange Commission regulatory powers which are of a sovereign character, since they

¹ Mann, loc. cit. (above, p. 147 n. 1), pp. 109-19; O'Connell, *International Law* (2nd ed., 1970), vol. 2, pp. 715-18; Albrecht, this *Year Book*, 29 (1952), pp. 145, 153-4, 156, 160; Rolin, *Recueil des cours*, 77 (1950), pp. 307, 370-1. *Contra*, Wurzel, *Columbia Law Review*, 38 (1938), p. 809; but he seems to confuse the absence of rules of customary international law against double taxation with the question whether international law puts any limits at all on a State's right to tax (pp. 815-16). He cites cases of abusive tax practices in various countries (pp. 835-43), but these reflect a questionable interpretation of sound connecting factors (especially residence) rather than an abandonment of reasonable connecting factors altogether.

² *Imperial Tobacco Co. of India v. Commissioners of Income Tax* (1958), I.L.R., vol. 27, p. 103.

³ Moore, *History and Digest of International Arbitrations*, p. 3424.

⁴ Hyde, *International Law* (2nd ed., 1947), vol. 1, p. 665. The first of these propositions is supported by Wharton, *International Law Digest* (1887), vol. 2, p. 514, and by Moore, vol. 4, p. 22.

⁵ *Foreign Relations of the U.S.* (1906), vol. 2, p. 1408.

⁶ Wurzel, *Columbia Law Review*, 38 (1938), pp. 809, 815, n. 28; Whiteman, vol. 8, p. 537.

⁷ *Amsterdam v. Minister of Finance* (1952), I.L.R., vol. 19, p. 229; Kiss, op. cit. (above, p. 147 n. 6), vol. 4, pp. 59-60. Such legislation may be enforced by sanctions against nationals, but not by seizure of the property in another State's territory: see above, p. 148.

⁸ See below, pp. 251-2.

can be exercised only by the Commission and not by private individuals. It is submitted that '...the extension of the regulatory and penal provisions of the Securities Exchange Act . . . to foreign corporations which have neither publicly listed securities in the United States nor publicly offered securities within the United States is a violation of international law'.¹ The Act was amended in 1964 in violation of this principle. Following protests by foreign governments,² the Securities and Exchange Commission made new rules which in practice more or less eliminated the violation of international law caused by the 1964 amendments.³

What about those areas of municipal law which may loosely be described as 'private law', i.e. those areas of law which are not concerned with the functioning of public bodies or with the sovereign rights of the State? Does international law limit the legislative jurisdiction of States in these areas?

It has sometimes been suggested that *all* extraterritorial legislation is contrary to international law. In this connection a tag from Justinian's *Digest* is often quoted: *extra territorium ius dicenti impune non paretur*.⁴ What this tag means is that a man can disobey a judge with impunity outside the territory over which the judge has jurisdiction. This is not the same as saying that the judge (or the legislator) breaks international law if he asserts extraterritorial jurisdiction; ineffectiveness is not the same as illegality. In any case, the limits on the jurisdiction of Roman courts were imposed by municipal law, not by international law.⁵ The view that

¹ *Barcelona Traction case*, I.C.J. Reports, 1970, p. 167, per Judge Jessup, quoting the Committee on International Law of the Association of the Bar of the City of New York. See also Stevenson in *International Financing and Investment* (ed. McDaniels, 1964), pp. 432-6.

By listing or issuing securities in the United States, the foreign corporation is apparently presumed to submit to United States law. This presumption is often justified, but not always: see *Schoenbaum v. Firstbrook* (1968), *American Journal of International Law*, 64 (1970), p. 175, and the criticism by Bator, *Proceedings of the American Society of International Law*, 64 (1970), pp. 141, 144.

When a transaction in securities has occurred in whole or in part in the United States, application of United States law is justified under the territorial principle: *Columbia Law Review* 69 (1969), p. 94; *Columbia Journal of Transnational Law*, 10 (1971), p. 150. Where stock is issued simultaneously in the United States and abroad, the foreign underwriters can be regarded as accessories to the acts of the United States underwriters, and thus subject to United States jurisdiction: Stevenson, *op. cit.*, pp. 455-9.

² *Canadian Year Book of International Law*, 5 (1967), pp. 317-18.

³ Bator, *ibid.*, p. 141; *Columbia Law Review*, 69 (1969), pp. 109-11; Stevenson, *American Journal of International Law*, 63 (1969), p. 278; *Harvard Law Review*, 83 (1969), p. 404; Buxbaum, *Securities Law Review*, 1 (1969), p. 677; Goldman and Magrino, *ibid.*, 2 (1970), p. 831.

⁴ D. 2. 1. 20. This tag is often quoted without thinking, e.g. the misquotation *extra territorium ius dicenti non impune paretur* in *Cooke v. Charles A. Vogeler*, [1901] A.C. 102, 108. If rules of Roman law limiting the powers of courts are regarded as a source of rules of international law limiting the powers of legislators, one could quote tags pointing in a very different direction, e.g. *Codex*, 3. 15. 1: *Quaestiones . . . criminum . . . ubi reperiuntur qui rei esse perhibentur criminis, perfici debere satis notum est*.

⁵ In the same way the medieval statisticians thought that legislative power was limited because it was delegated by the Holy Roman Emperor (de Nova, *Recueil des cours*, 118 (1966), pp. 441, 444 et seq.). It is thus dangerous to rely on medieval writers, as Mann does, *loc cit.* (above, p. 147 n. 1), pp. 24-5.

extraterritorial legislation is *invariably* contrary to international law was rejected by the Permanent Court of International Justice in the *Lotus* case.¹

Story says that a State may legislate for its subjects abroad, but that all other forms of extraterritorial legislation infringe the sovereignty of other States.² This view is supported by a number of other writers,³ although it should be pointed out that many writers who appear to agree with Story are really concerned only with defining the circumstances in which the laws of one State will be denied enforcement in other States,⁴ and a refusal to enforce foreign laws does not necessarily indicate that those laws are contrary to international law; States seldom enforce the criminal or revenue laws of other States, even when such laws are in accordance with international law.

Mann adopts a more sophisticated approach, since he considers that the principle of territoriality is too crude to be applicable to modern conditions. He argues that a State may not apply its law unless there is a close connection between the State and the person, thing or event to which the law is to be applied; two or more States may sometimes have concurrent legislative jurisdiction, but the *lex fori* should not apply where it has no substantial connection with the facts.⁵ This view is supported by a number of authors,⁶ although others maintain that international law imposes no limits on the legislative jurisdiction of States over 'private law' relationships.⁷

Mann attributes significance to the principle of interpretation followed by English and American courts, whereby a statute, in the absence of clear words to the contrary, will be presumed not to apply extraterritorially.⁸ But this principle goes much further than international law requires; there is a presumption that British statutes do not apply to United Kingdom citizens abroad, to British colonies or to British ships, although clearly nothing in international law requires the United Kingdom to limit the reach of its legislation in this way.⁹ Again, many of the cases are not concerned with international law, but with *constitutional* limitations on the

¹ (1927), *P.C.I.J.*, Series A, No. 10, p. 19.

² Joseph Story, *Commentaries on the Conflict of Laws*, s. 20.

³ Rolin, *Recueil des cours*, 77 (1950), pp. 307, 370, 373; Mann, loc. cit. (above, p. 147 n. 1), pp. 28-30, 63; Beale, *Harvard Law Review*, 36 (1923), p. 241.

⁴ Dicey, *Conflict of Laws* (2nd ed., 1908), p. 28. Huber (translated in this *Year Book*, 18 (1937), pp. 49, 64), probably meant the same. In *Amsterdam v. Minister of Finance* (1952), I.L.R., vol. 19, pp. 229, 232-4, 243, the Supreme Court of Israel said that Story's theory was a rule of Anglo-American private international law, not of public international law.

⁵ Mann, loc. cit. (above, p. 147 n. 1), pp. 36-62.

⁶ Wolff, *Private International Law* (2nd ed., 1950), pp. 12 et seq.; H. Lauterpacht, *International Law* (collected papers ed. by E. Lauterpacht, 1970), vol. 1, p. 38.

⁷ Cook, *The Logical and Legal Bases of the Conflict of Laws* (1949), pp. 41, 71 et seq.; Lorenzen, *Columbia Law Review*, 20 (1920), pp. 247, 269.

⁸ Mann, loc. cit. (above, p. 147 n. 1), pp. 63-72. He admits (p. 63) that this principle of interpretation is seldom followed on the Continent.

⁹ *Maxwell on the Interpretation of Statutes* (12th ed., 1969), pp. 169-83.

legislative powers of colonies or of member-states of a federation.¹ The 'full faith and credit' clause and the 'due process' clause in the United States Constitution limit the legislative powers of states to a degree which is manifestly not required by international law.²

It is true that many English and American cases contain dicta that international law does not allow a State to apply its laws to the activities of aliens abroad. But in most cases the dicta are too wide, since the cases concerned criminal law,³ or taxation,⁴ or the seizure by warships of foreign vessels on the high seas;⁵ so they are of little relevance to cases of 'private law'. Some of the cases which do deal with 'private law', and which hold that various statutes are not applicable to foreigners abroad, turn on the interpretation of the statute and not on rules of international law.⁶ Others do profess to lay down rules of international law, but are contradicted by other authorities.

For instance, in *The Zollverein* it was said to be beyond the power of the legislature to pass a statute governing the civil liability of a foreign ship involved in a collision on the high seas.⁷ But English courts have no hesitation about applying rules of the common law to foreign ships involved in collisions on the high seas; these rules are supposed to be part of the 'general maritime law' common to all countries, but the English version of them differs from the version adopted in many other countries,⁸ and many writers say that there is no such thing as a general maritime law.⁹ Some English Acts of Parliament clearly do govern the civil liability of foreign ships for collisions on the high seas,¹⁰ and many other countries apply their *lex fori* to collisions involving foreign ships on the high seas.¹¹

¹ Mann, loc. cit. (above, p. 147 n. 1), pp. 45-6; *Trustees and Executors Agency Co. v. Federal Commissioner of Taxation* (1933), 49 C.L.R. 220, 235-6.

² *Home Insurance Co. v. Dick* (1930), 281 U.S. 397 (especially 407-8).

³ *The Annapolis* (1861), 167 E.R. 128, 134; *R. v. Anderson* (1868), L.R. 1 C.C.R. 161, 170; *R. v. Keyn* (1876), 2 Ex. D. 63, 160; *Macleod v. Attorney-General for New South Wales*, [1891] A.C. 455, 457, 458; *R. v. Jameson*, [1896] 2 Q.B. 425, 430; *Trustees and Executors Agency Co. v. Federal Commissioners of Taxation* (1933), 49 C.L.R. 220, 239; *U.S. v. Palmer* (1818), 3 Wheaton 610, 631; *American Banana Co. v. United Fruit Co.* (1909), 213 U.S. 347, 355-7 (this was an action in tort, but the court said 'the law begins by making criminal the acts for which it gives a right to sue'). See also *British Practice in International Law* (1965), p. 127.

⁴ *Colquhoun v. Heddon* (1890), 25 Q.B.D. 129, 135; *State of Minnesota v. Karp* (1948), *Annual Digest*, 1948, p. 10 (Ohio).

⁵ *Rose v. Himely* (1808), 4 Cranch 241, 279; *The Apollon* (1824), 9 Wheaton 362, 370; *Lopez v. Burslem* (1842), 13 E.R. 318, 320; *Croft v. Dunphy*, [1933] A.C. 156, 162.

⁶ *Maxwell on the Interpretation of Statutes* (12th ed., 1969), pp. 171-3, 177 et seq.; *New York Central Rail Road Co. v. Chisholm* (1925), 268 U.S. 29; *Vanity Fair Mills v. T. Eaton Co. Ltd.* (1956), I.L.R., vol. 23, p. 276. In *Jefferys v. Boosey* (1854), 10 E.R. 681, 725, Parke, B., talked about 'the power of the legislature', which may perhaps indicate that he was thinking in terms of international law, but the other judges did not use such language (730, 736, 742).

⁷ (1856), 166 E.R. 1038, 1039-40, followed in *Cope v. Doherty* (1858), 70 E.R. 154.

⁸ *Restatement, Second, Foreign Relations Law of the U.S.* (1965), pp. 98-100.

⁹ Rabel, *The Conflict of Laws* (2nd ed., 1960), vol. 2, p. 338. Treaties concluded for the unification of laws on collisions would be unnecessary if uniformity existed.

¹⁰ Merchant Shipping Act Amendment Act, 1862, s. 54; *The Amalia* (1863), 15 E.R. 778.

¹¹ Rabel, op. cit. (n. 9 on this page), pp. 340, 351; *Nederlands Tijdschrift voor Internationaal Recht*, 18 (1971), p. 345; T.M.C. Asser Instituut, *Statutory Private International Law* (1971),

In the United States the Jones Act gives seamen the right to sue their employers for service-incurred injury, and the Supreme Court held in *Lauritzen v. Larsen* that various factors (the place of the wrongful act, the nationality of the ship, the nationality and domicile of the plaintiff, the nationality of the defendant, the place where the contract was made, the inaccessibility of the foreign forum, the *lex fori*) had to be weighed against one another to determine whether the Jones Act applied; application of the Jones Act to cases which had no real connection with the United States would be contrary to international law.¹ But the United States' Death on the High Seas Act (which creates a right to compensation under United States law) applies to all deaths, regardless of the nationality of the ship (or aircraft) or parties;² and United States statutes forbid carriers by sea to exempt themselves from liability, even though the facts of the case have little real connection with the United States.³ United States laws prescribing the time at which seamen's wages should be paid have been applied to foreign ships calling at United States ports.⁴

In *Ex parte Blain*, it was said that it would be contrary to international law if English bankruptcy law were applied by an English court to a

pp. 128 and 286; Dalloz (1966), p. 577; *The Scotland* (1881), 105 U.S. 24, 29-31; *The Titanic* (1914), 233 U.S. 718, 733; *Black Diamond Steamship Co. v. Robert Stewart and Sons* (1949), 336 U.S. 386; *British Transport Commission v. U.S.* (1957), 354 U.S. 129. German courts apply German law to collisions between foreign vessels in foreign territorial waters: Ehrenzweig *Private International Law: General Part* (1967), p. 205. In the Soviet Union, Soviet law applies to all collisions and claims for salvage: Merchant Shipping Code, 1968, Art. 14 (7); (Art. 4 (d) of the 1929 Code also added towage contracts).

In 1899 the British Government protested that Italian courts had broken international law by applying Italian law to determine the tortious liability of British ship-owners for a collision between a British merchant ship and a British warship in the territorial sea of Gibraltar (quoted by Parry in *Annali della Facoltà di Giurisprudenza dell'Università di Bari*, 16 (1960), pp. 7-9); the proceedings had been brought in an Italian court by relatives of Italian passengers on the British merchant ship. But this appears to be an isolated protest against a practice which is followed not only by Italy, but also (as we have seen) by Germany and the Soviet Union.

¹ (1953), 345 U.S. 571, 577-8. There is a similar dictum in *McCulloch v. Sociedad Nacional de Marineros de Honduras* (1963), 372 U.S. 10, 21, but this involved the supervisory powers of the National Labour Relations Board and is not therefore a case of 'private law'; see also *Foreign Relations of the U.S.* (1924), vol. 1, pp. 683-5 and 689-90 and *R. v. Foster* (1959), I.L.R., vol. 30, p. 112.

² *Fernandez v. Línea Aeropostal Venezolana* (1957), *ibid.*, vol. 24, p. 267. See also Ehrenzweig, *op. cit.* (above, p. 183 n. 11), pp. 200-1; *The Esso Malaysia*, [1974] 2 All E.R. 705.

³ Other countries have similar statutes: Rabel, *The Conflict of Laws* (2nd ed., 1960), vol. 2, pp. 417-29. The Yugoslav law on contracts concerning the use of sea-going ships applies whenever application of another law would be less favourable to the passenger (s. 130 (3)). See also below, p. 205.

⁴ Briggs, *The Law of Nations* (2nd ed., 1952), pp. 352-3; *Lakos v. Saliaris* (1940), *Annual Digest*, 1941-42, p. 155. In *Sandberg v. McDonald* (1918), 248 U.S. 185, and *Jackson v. S.S. Archimedes* (1928), 275 U.S. 463, the Supreme Court refused to apply United States law, partly because the law imposed criminal as well as civil liability on the shipowner and the Court did not want to apply United States criminal law to acts done by foreigners abroad. Proposals in Congress (which were never carried out) to extend United States law (minus the criminal sanctions) in a way which would have reversed the effect of these decisions gave rise to protests from other States that such a move would be contrary to international law (Briggs, *op. cit.*, p. 353). But these protests can be explained on a different ground: see below, pp. 189-90.

foreigner who had never set foot in England.¹ (The foreigner was a member of an English firm which had traded in England and contracted debts in England.) The effect of this decision was reversed by Act of Parliament in 1913, apparently without causing protests by foreign governments.² It is true that Judge Fitzmaurice, in his separate opinion in the *Barcelona Traction* case, said that international law did impose some limits on the bankruptcy jurisdiction of States.³ But this is a statement of one judge out of sixteen, and he did not say what the limits were (apart from declaring that they had been exceeded in the case before him), nor did he cite any authority for his view. He also said that the bankruptcy proceedings were a disguised expropriation (i.e. carried out by the authorities in bad faith); and this by itself would be enough to make the Spanish Government liable, without making it necessary to consider the question of jurisdiction.

At one time English courts said that Parliament had no power to legislate for foreign companies, even if they carried on business in England.⁴ This view is no longer tenable; Part X of the Companies Act, 1948, lays down many rules relating to foreign companies which have branches in England. No rule of international law forbids a State to wind up a foreign company doing business in its territory;⁵ English courts even claim the power to wind up a foreign company which has never done business in England, provided that it has assets in England.⁶

Private international lawyers are familiar with the tendency of courts to follow a "homeward trend", a tendency to arrive, if possible, at the application of domestic law.⁷ In many cases the homeward trend is achieved by making exceptions to the normal choice of law rules; the courts will normally apply foreign law, but will apply the *lex fori* instead if the parties do not invoke foreign law, if the content of foreign law is not proved, if its content is contrary to public policy, if the substantive rule of foreign law is closely tied to a particular judicial or administrative procedure which does not exist in the *lex fori*, or if the normal connecting factor is missing (e.g. the choice of law rule refers to the *lex patriae* but the *de cuius* is stateless). Simply because these cases are exceptions to the normal practice, they hardly justify the conclusion that systematic application of the *lex fori* in all cases would be in accordance with public international law.

¹ (1879), 12 Ch. D. 522, 527. See also *Re A.B. & Co.*, [1900] 1 Q.B. 541, 544.

² Bankruptcy jurisdiction in the United States is equally wide: Nadelmann, *International and Comparative Law Quarterly*, 12 (1963), p. 685.

³ *I.C.J. Reports*, 1970, 104-6.

⁴ *Colquhoun v. Heddon* (1890), 25 Q.B.D. 129, 134-5, 140, 142; *Bulkeley v. Schutz* (1871), L.R. 3 P.C. 764, 769.

⁵ In the *Barcelona Traction* case, *I.C.J. Reports*, 1970, p. 104, Judge Fitzmaurice admitted that this was so as a general rule.

⁶ *In re Compania Merabello San Nicholas S.A.*, [1973] Ch. 75; *Halsbury's Laws of England* (3rd ed.), vol. 6, pp. 843-5.

⁷ Nussbaum, *Principles of Private International Law* (1943), p. 37.

But in other cases there is a systematic application of the *lex fori*. In nineteenth-century Germany tort was assimilated to crime in the sense of being governed by the *lex fori*.¹ Even today tortious liability is still governed by the *lex fori* in several countries; in some countries the plaintiff must also prove that the act was a tort (or at least 'not justifiable') under the *lex loci delicti*, but the fact remains that the plaintiff will lose his case if he cannot prove that the act is a tort under the *lex fori*.² In modern Germany liability is normally governed by the *lex loci delicti*, but the liability of a German national for a tort committed abroad cannot be greater than it would have been under the German law of tort.³ Breach of promise to marry, which is classified as a tort in some countries and as a breach of contract in others, is governed by the *lex fori* in a number of countries.⁴ In Communist countries, especially the U.S.S.R., the essential validity of a contract is governed by the *lex fori* if a nationalized enterprise of the State of the forum is a party to the contract.⁵ Some Latin American countries require contracts to be made in accordance with the forms prescribed by the *lex fori* if the contract is to be enforced in the forum.⁶ As regards form generally, compliance with the forms prescribed by the *lex fori* is considered in a few countries as an alternative to compliance with the forms prescribed by the *lex loci* (or other systems).⁷

Lauterpacht suggests that the systematic application of the *lex fori* to questions of family law would be contrary to public international law.⁸ However, Communist countries have come close to doing precisely this in many areas of family law, without provoking protests from other States.⁹ In the United States and under the Montevideo Convention the relations between a mother and her illegitimate child are governed by the *lex fori*.¹⁰ In France the question whether a foreigner is old enough to join the Foreign Legion without parental consent is governed by French law and

¹ Wolff, *Private International Law* (2nd ed., 1950), p. 405. Fornication was regarded as similar to crimes and torts, and the illegitimate child's right to maintenance against the father was governed by the *lex fori* for the same reason.

² Rabel, *The Conflict of Laws* (2nd ed., 1960), vol. 2, pp. 237, 244; Szászy, *International and Comparative Law Quarterly*, 18 (1969), pp. 103, 125; Batiffol, *Droit international privé* (5th ed., 1971), vol. 2, p. 195; Cheshire (and P. M. North), *Private International Law* (8th ed., 1970), Chapter 10.

³ E.G.B.G.B., Art. 12. The rule is the same in Japan.

⁴ Rabel, *op. cit.* (above, n. 2 on this page), pp. 217, 219-20.

⁵ Szászy, *loc. cit.* (above, n. 2 on this page), pp. 105-6, 119.

⁶ Rabel, *op. cit.* (above, n. 2 on this page), Chapter 31.

⁷ T.M.C. Asser Instituut, *Statutory Private International Law* (1971), pp. 304-5 (U.S.S.R.—general) and 250 (Israel—wills). See below, p. 223.

⁸ H. Lauterpacht, *International Law* (collected papers ed. by E. Lauterpacht, 1970), vol. 1, p. 38.

⁹ De Lapradelle and Niboyet, *Répertoire de droit international* (1930), vol. 7, pp. 114-17; Szászy, *Private International Law in the European People's Democracies* (1964), pp. 345-6, 348, 350-2, 360; Grzybowski, *Soviet Private International Law (Law in Eastern Europe, No. 10, 1965)*, pp. 125 et seq.

¹⁰ Rabel, *The Conflict of Laws*, vol. 1 (2nd ed., 1958), p. 654.

not by the personal law.¹ Courts in common law countries often apply the *lex fori* in cases involving family law (for instance, an English court, unlike a French court, never applies foreign law in a divorce case), but the jurisdiction of courts in common law countries is usually limited in such a way that the application of the *lex fori* seems natural; however, in cases involving the guardianship of children, the jurisdiction of the court can be based on (*inter alia*) the mere presence of the child within the territory,² and application of the *lex fori* in these circumstances is much more startling. The present position in England with regard to affiliation proceedings is not dissimilar.³

In the Soviet Union the *lex fori* applies to most questions of inheritance.⁴ In France, Belgium, the Netherlands, and many Latin American countries a *droit de prélèvement* exists; if part of the estate is situated in the State of the forum and if a national of that State would have been entitled to succeed to part of the estate if the *lex fori* had been applicable, his share in the inheritance cannot be less than that which he would inherit from the whole estate under the *lex fori*—consequently he is allowed to take the whole of his share out of that part of the estate which is situated in the State of the forum.⁵

These cases in which the *lex fori* is applied to facts which have little or no real connection with the State of the forum may not be very frequent or desirable, but they are too numerous to be disregarded. They are certainly far more numerous than the very rare instances of other States protesting against the application of the *lex fori*. The overwhelming preponderance of the relevant State practice therefore suggests that there are no rules of international law limiting the legislative jurisdiction of States in questions of what might loosely be described as 'private law' (i.e. those areas of municipal law which are not concerned with crimes, the functioning of public bodies or the sovereign rights of the State).

Locus standi to protest

As in the case of criminal trials,⁶ the sanction for an excess of legislative jurisdiction is a protest and/or claim for compensation by the national State of the individual adversely affected. The mere enactment of legislation, before it is enforced, will not normally create a right to compensation,⁷ but it is permissible to protest as soon as the legislation is enacted or even when

¹ Kiss, *op. cit.* (above, p. 147 n. 6), vol. 2, p. 120; *Annuaire français de droit international* (1965), p. 953, (1967), p. 830.

² See above, p. 176 n. 5.

³ *R. v. Bow Road Justices, Ex parte Adedigba*, [1968] 2 Q.B. 572.

⁴ Rabel, *The Conflict of Laws* (1st ed., 1958), vol. 4, p. 261.

⁵ *Ibid.*, p. 263. See also Art. 25 of the German E.G.B.G.B.

⁶ See above, p. 169.

⁷ But there can be exceptions. See the *Mariposa* claim (1933), *Annual Digest*, 1933-34, pp. 255, 257; Bin Cheng, *General Principles of Law* (1953), pp. 174-5.

official proposals for such legislation are made.¹ As for the question whether the mere enactment of legislation, before it is enforced, entitles a State to resort to arbitration, the law is unclear.²

2. THE CONTENT OF LEGISLATION AND ABUSE OF RIGHTS

Even when a State has legislative jurisdiction, the State will break international law if the content of its legislation is contrary to international law. For instance, a State can punish foreigners for crimes committed within its territory, but its law will fall below the minimum international standard if it prescribes a barbarous punishment; a State can pass a law expropriating foreign-owned property situated within its territory, but the law must provide for compensation.³ Again, it follows from what was said at the end of the previous section⁴ that a State is entitled to attribute a universal scope to its rules of family law; but if the content of that law prescribes that all marriages between aliens in foreign countries are void, the State is in breach of international law, at least if one takes the view that respect for basic human rights is now required by international law, because Article 16 (1) of the Universal Declaration of Human Rights provides that 'men and women of full age . . . have the right to marry and to found a family . . .'.⁵ Similarly, although a State is entitled to legislate for its nationals abroad, even in the field of criminal law, it would break international law if it required them to commit acts of subversion against another State within the latter's territory.⁶ More generally, a State may not legislate so as to oblige foreigners resident abroad to adopt its own ideology or to take its side in its quarrels with other States, for that would be contrary to the political independence of the State where the foreigners reside.⁷ The laws of a State which obliged or even permitted people inside that State to counterfeit the currency of another State would be contrary to international law.⁸

A more controversial situation arises where nationals of State *A* own industries in State *B*. Although a State is normally entitled to legislate for its nationals abroad, it is submitted that State *A* is not entitled to use such

¹ MacGibbon, this *Year Book*, 30 (1953), pp. 293, 299-305; B. A. Wortley, *Expropriation in International Law* (1959), pp. 72, 74-5.

² The United Kingdom and the United States adopted opposite attitudes on this question in the Panama Tolls controversy, 1912-14: McNair, *The Law of Treaties* (1961), pp. 547-9. As stated above, there will normally be no right to claim compensation, but does the claimant State have *locus standi* to ask for a declaratory judgment?

³ See also below, p. 225.

⁵ See also below, p. 230.

⁶ United States courts sometimes say that the United States is entitled to regulate the conduct of its nationals abroad 'when the rights of other nations or their nationals are not infringed': *Skiriotes v. Florida* (1941), 313 U.S. 69, 73.

⁷ See above, pp. 158-9.

⁴ See above, pp. 186-7.

⁸ *U.S. v. Arjona* (1887), 120 U.S. 479.

legislative power in a way which would mean imposing its own economic policy on State *B*. One of the General Assembly resolutions on permanent sovereignty over natural resources 'confirms that the exploitation of the natural resources in each country shall always be conducted in accordance with its national laws and regulations';¹ and the United Kingdom Government has stated that States may apply their antitrust laws to the activities of their nationals abroad 'only provided that this does not involve interference with the legitimate affairs of other States'.² The economic policy of State *B* may be expressed in rules of law which require or forbid enterprises to do certain things, or it may be expressed in rules of law which merely leave enterprises free to act as they think best. It does not matter whether State *B* adopts a dirigiste policy or a liberal policy; in either case other States would break international law if they required their nationals in State *B* to act in a way which would thwart State *B*'s economic policy.

Even when the content of legislation does not infringe a specific rule of international law, it may nevertheless be contrary to international law if it constitutes an abuse of rights.³ This will be so if the legislation is designed to produce mischief in another country without advancing any legitimate interest of the legislating State. For instance, if the United Kingdom required its citizens to drive on the left-hand side of the road in foreign countries, this would cause havoc in foreign countries where the rule of the road was different, without advancing any legitimate interest of the United Kingdom; indeed, it would be difficult to imagine what motive other than a desire to cause mischief could produce such legislation. Although the United Kingdom has jurisdiction to legislate for its citizens abroad, the content of this particular piece of legislation is an abuse of rights and therefore contrary to international law, and it makes no difference whether the legislation is framed in terms of criminal law or in terms of tortious liability.

There will also be an abuse of rights if legislation is aimed at advancing the interests of the legislating State illegitimately at the expense of other States. For instance, during the 1920s proposals were made in the United States Congress to alter United States law in order to give foreign seamen (serving on foreign ships) a contractual right to demand half their wages when the ship arrived in a United States port, even though the law of the

¹ Resolution 2158 (XXI) of 25 November 1966, para. 4.

² *British Practice in International Law* (1967), p. 60.

³ Verzijl, *International Law in Historical Perspective* (1968), vol. 1, pp. 316–20, argues that there is no such thing as abuse of rights, because in all cases the State concerned did not have the alleged right in the first place, so that the question whether the right was abused did not arise. This may be true in most cases (Schwarzenberger, *International Law and Order* (1971), Chapter 6), but not in all (Whiteman, vol. 5, pp. 224–30). At all events, it is submitted that legislative jurisdiction (which is not mentioned by Verzijl and Schwarzenberger) can give rise to genuine examples of abuse of rights—the State has a right to legislate and acts illegally only because it abuses that right.

flag State postponed the time for payment; in calculating the wages due to the seamen, advances paid in foreign countries were to be disregarded (i.e. the employer would have to pay again). Wages on United States ships were higher than wages on foreign ships, and the purpose of the proposed legislation (which was never passed) was to encourage foreign seamen to desert from foreign ships and to take up work on United States ships, thereby reducing labour costs and rectifying a shortage of labour on United States ships and increasing labour costs and causing general inconvenience on foreign ships.¹ It is not surprising that foreign States protested that the proposed legislation was contrary to international law.²

3. ANTITRUST LAW

The law against restrictive business practices (or, to use the convenient American term, antitrust law) is a source of great controversy and many problems concerning jurisdiction in international law. A preliminary problem concerns the classification of antitrust law. It has been suggested in the previous sections of this study that international law imposes limits on the legislative jurisdiction of States as regards criminal law and laws concerned with the functioning of public bodies or with the sovereign rights of States, but not (at least as a general rule) as regards other areas of municipal law. Antitrust law is difficult to fit into this system, because breaches of its rules are usually sanctioned both by criminal proceedings and by civil proceedings. It is submitted, therefore, that the internationally permissible reach of antitrust law varies according to the nature of the proceedings instituted in any given case.³

When breaches of antitrust law are punished by criminal proceedings, the jurisdiction of States is subject to the same limits as in other cases of criminal law. Similar limits apply when the sanction takes the form of a fine or penalty payment imposed by a public authority (as under E.E.C. Regulation 17) or of confiscation of property acquired as a result of breach of antitrust laws (this is a sanction in the United States, but is seldom used)

¹ *Foreign Relations of the U.S.* (1931), vol. 1, pp. 811-14.

² Briggs, *The Law of Nations* (2nd ed., 1952), p. 353.

³ Van Hecke, *Recueil des cours*, 106 (1962), pp. 302-3, agrees. A similar problem arises when antitrust law is enforced in a foreign court. Thus Mann, *ibid.*, 132 (1971), pp. 107, 180, argues that a private plaintiff could bring a triple damage claim under the Sherman Act in a foreign court, but that attempts by the United States authorities to enforce the Sherman Act in foreign courts would fail because of the rule that courts of one State do not enforce the criminal or public laws of another. On the machinery for enforcing antitrust laws in the United States, see *International and Comparative Law Quarterly* (1963), Supplement No. 6, pp. 40 et seq.

It may seem formalistic and technical to make the reach of antitrust law vary according to the nature of the proceedings. But similar variations occur in the case of many acts which are both crimes and torts. For instance, a State may apply its law of tort to acts of conversion committed abroad in circumstances where it would not be entitled to apply its criminal law of theft to the same acts.

—fines and confiscations are an assertion of sovereign power. Cease and desist orders issued by the United States Federal Trade Commission fall into the same category; the Federal Trade Commission does not adjudicate claims by a private complainant (like an English rent tribunal) but acts on its own motion to enforce the law in the interests of the public; only the Federal Trade Commission may apply to civil courts for the enforcement of its orders. In other words, the Federal Trade Commission's powers are sovereign powers because they are not shared by private individuals.

Conversely, where a plaintiff in a tort action seeks damages for loss caused to him by a restrictive business practice,¹ or where a defendant in an action for breach of contract pleads that the alleged contract is void because it is contrary to antitrust law, there are normally no limits to the extraterritorial reach of the forum's antitrust law. (But even here an exception exists when application of the forum's antitrust law to events occurring in another State would thwart the economic policy of the latter State.²)

More difficult is the civil suit for injunctive or other equitable relief in the United States, which can be brought either by the injured party or by the Department of Justice. For the purposes of determining the limits of jurisdiction permitted by international law, it is submitted that a suit by the injured party is similar to a private action in tort for damages, and that a suit by the Department of Justice is similar to a criminal prosecution. In form a suit by the Department of Justice resembles a suit by the injured party, but 'in substance it is a public prosecution . . . for vindication of public right and for redress and prevention of public injury'.³ The Department of Justice is not subject to the rules which limit the *locus standi* of private plaintiffs,⁴ and some of the orders made by courts in proceedings brought by the Department are orders which would never be made in proceedings brought by a private party (e.g. an order to the defendant to sell goods on non-discriminatory terms to *any* applicant).⁵ In other words, the Department, when bringing such a suit, is exercising sovereign powers, powers which are not shared by private litigants.

When breach of the law is subject to a 'private' remedy and to a 'sovereign' sanction, there are two possibilities—either the legislator can attribute a wider extraterritorial scope to 'private' actions than to criminal

¹ The fact that the damages payable exceed the loss suffered (as in the triple damage suit in United States law) makes no difference. Cf. *Huntington v. Attrill*, [1893] A.C. 150, 156; *Chattanooga Foundry v. Atlanta* (1906), 203 U.S. 390; Stimson, *Conflict of Criminal Laws* (1936), pp. 39-46; Dicey and Morris on the *Conflict of Laws* (8th edn., 1967), p. 161.

² See above, pp. 188-9.

³ *Hartford Empire Co. v. U.S.* (1945), 323 U.S. 386, 441.

⁴ Clayton Act, 1914, 38 Stat. 730, sections 15 and 16; *U.S. v. Borden Co.* (1954), 347 U.S. 514, 518-19.

⁵ *International Salt Co. v. U.S.* (1947), 332 U.S. 392; *U.S. v. National Lead Co.* (1947), 332 U.S. 319, 328-35; Haight in *Legal Problems of Foreign Investment* (Report of a conference at the Yale Law School 1962), p. 104.

or other 'sovereign' proceedings, or he can limit the scope of the former to bring it into line with the scope of the latter. United States law seems to follow the second course; one of the reasons why the Supreme Court held, in *American Banana Co. v. United Fruit Co.*, that the Sherman Act gave no cause of action in tort for acts done abroad was that the Act 'begins by making criminal the acts for which it gives a right to sue'.¹ But the number of 'private' actions in which the extraterritorial reach of antitrust laws has been tested is small, both in the United States and elsewhere. The *causes célèbres* which have given rise to controversy have almost all arisen out of 'sovereign' proceedings (usually suits for equitable relief by the United States Department of Justice). It seems to be generally agreed that the limits applicable to a State's jurisdiction in such cases are the same as (or very similar to) the limits governing a State's jurisdiction in criminal law. The application of this principle, however, causes unexpected difficulties.

Territorial principle

It is often difficult to localize restrictive business practices for the purposes of the territorial principle of jurisdiction; unlike ordinary crimes, they frequently take the form of complicated patterns of conduct, extending over a long period of time and over a wide geographical area. But the effort must be made. At a time when fears are often expressed that 'international' companies are above the law and are becoming more powerful than States,² it would be intolerable if the transnational character of a restrictive business practice removed it from the ambit of *any* State's law.³ It would also be intolerable if a large number of States claimed concurrent jurisdiction; the content of antitrust law varies enormously from one State to another, and business cannot be carried on efficiently if it is subject to conflicting requirements from different States. As far as possible, therefore, restrictive business practices should be subject to municipal law but the number of States claiming jurisdiction should be as small as possible. In some cases this principle can be applied easily. For instance, if a company requires its distributors to follow a policy of retail price maintenance, the legality of retail price maintenance in State *A* will be tested by the law of State *A*, the legality of retail price maintenance in State *B* will be tested by the law of State *B*, and so on. In other cases such solutions are impracticable; if two companies allocate markets, so that a producer in State *A* agrees to sell only in State *A* and a producer in State *B* agrees to sell only in State *B*, it is impossible for State *A* to determine the legality of what has happened

¹ (1909), 213 U.S. 347, 357.

² Wayland Kennet and others, *Sovereignty and the Multinational Company* (Fabian Tract No. 409, 1971).

³ *U.S. v. Pacific and Arctic Railway* (1913), 228 U.S. 87, 106.

in its own territory without taking into account what has happened in State *B*'s territory—the result is that both States have concurrent jurisdiction over the whole arrangement.¹

In order to claim jurisdiction under the territorial principle,² is it necessary to prove that the defendant has done something on the State's territory, or is it sufficient to show that the effect of his actions has been felt on the State's territory? This question has given rise to considerable controversy, but the controversy is of fairly recent origin; until recently the United States was the only State in which this question had arisen, and until 1945 almost all the United States cases involved acts which had both been performed (at least in part) on United States territory and produced effects on United States territory.³

U.S. v. Aluminium Company of America and others (the *Alcoa* case),⁴ decided in 1945, raised for the first time the question of effects felt within the United States as a result of acts done by foreigners abroad. In this case foreign companies had agreed among themselves that each company would pay royalties to the other companies if its production of aluminium exceeded a certain level; the result was to discourage the production of aluminium beyond that level, and it was possible that the resulting shortage of aluminium had affected the levels of imports into the United States. The Court said:

It is settled law—as 'Limited' [the main foreign defendant] itself agrees—that any state may impose liabilities . . . for conduct outside its borders that has consequences within its borders . . . Two situations are possible. There may be agreements made beyond our borders not intended to affect imports, which do affect them, or which affect exports. Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade

¹ State *A* has jurisdiction not only over the producer in its own territory, but also over the producer in State *B*'s territory, since the two producers are accessories to one another's acts: cf. above, p. 153 n. 3, and p. 181 n. 1. Many United States antitrust cases can be explained on this ground: Mann, loc. cit. (above, p. 147 n. 1), pp. 98–9.

² Or, more precisely, the objective territorial principle. In view of the controversy over the range of the objective territorial principle, it is remarkable how little use has been made of the subjective territorial principle in antitrust law. United States antitrust law does not apply to agreements made in the United States and performed abroad (*American Banana Co. v. United Fruit Co.* (1909), 213 U.S. 347, 359; Molloy, *Yale Law Journal*, 49 (1940), pp. 1312, 1316), and the laws of other countries seem to show similar restraint. Indeed, it is possible that application of the subjective territorial principle in these circumstances would be contrary to international law because it might constitute an attempt to impose an alien economic policy on the State where the agreement was performed; see above, pp. 188–9. But see below, p. 204 n. 2.

³ Jennings, this *Year Book*, 33 (1957), pp. 146, 163–4; the same is true of *U.S. v. National Lead Co.* (1945), 63 F. Supp. 513 (affirmed (1947), 332 U.S. 319). However, s. 4 of the Webb–Pomerene Act, 1918, provides that s. 5 of the Federal Trade Commission Act shall apply to acts 'done without the territorial jurisdiction of the United States' if such acts constitute 'unfair methods of competition used in export trade against competitors engaged in export trade'; this provision was applied in *Branch v. Federal Trade Commission* (1944), 141 F. 2d 31; *Annual Digest*, 1943–45, p. 169. See below, p. 207 n. 2.

⁴ 44 F. Supp. 97; 148 F. 2d 416.

between the two. Yet when one considers the international complications likely to arise from an effort in the country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them. Such agreements may on the other hand intend to include imports into the United States, and yet it may appear that they have had no effect upon them.

The Court was not certain whether Congress intended the Act to apply to this second situation, but assumed for sake of argument that it did not. However, the Court held that, when intention to produce effects in the United States was proved, the burden of proof shifted to the defendant to prove that his acts had not had that effect in fact. Judgment was given against the foreign defendants because the Court held that they had intended to affect imports into the United States and because they had not succeeded in proving that imports had not been affected in fact.

Some commentators have pointed out that there is more to this case than meets the eye, since there were close ties between the American company (Alcoa) and the Canadian company (Limited)—they were controlled by the same shareholders and the two chairmen were brothers.¹ It might therefore be supposed that Limited had joined the cartel at Alcoa's suggestion and that the limitation of imports into the United States, which was the indirect effect of the cartel, was deliberately designed to maintain Alcoa's dominance over the United States market—in other words, the cartel was a disguised allocation of markets, covering the United States as well as Europe and Canada. But, far from deciding the case on this ground, the Court held expressly that Limited's acts could not be attributed to Alcoa and that there was insufficient evidence that Alcoa had encouraged the formation of the cartel.

Moreover, the 'effects doctrine' has been restated in subsequent United States antitrust cases, such as *U.S. v. Timken Roller Bearing Co.*,² *U.S. v. General Electric Co.*³ and *U.S. v. The Watchmakers of Switzerland Information Centre*.⁴ The first and third of these cases concerned acts done partly within the United States,⁵ so that reference to the effects doctrine was, strictly speaking, unnecessary for the decision. In the *General Electric* case, foreign companies had made an agreement allocating foreign markets among themselves; one of them (Philips) had also agreed with General Electric (a United States company) that it would not export to the United

¹ Stocking and Watkins, *Cartels or Competition* (1948), p. 77; Kronstein, Miller and Schwartz, *Modern American Antitrust Law* (1958), p. 272; Brewster, *Antitrust and American Business Abroad* (1958), p. 73; Haight, *University of Pennsylvania Law Review*, 111 (1963), p. 1122; Barnard, *International and Comparative Law Quarterly* (1963), Supplement No. 6, p. 101.

² (1949), 83 F. Supp. 284, affirmed (1951), 341 U.S. 593.

³ (1949), 82 F. Supp. 753; (1953), 115 F. Supp. 835.

⁴ (1963), Trade Cases 77, 414.

⁵ This is true of most of the acts in question in the *Swiss Watches* case, but not of all; see below, p. 199 n. 3.

States and that General Electric would not export to Philips' territories. Only the second agreement was held to be contrary to United States law, a decision which is unexceptionable; but, once again, the reference to 'effects' was perhaps wider than the facts of the case required.

In *Hazeltine Research, Inc. v. Zenith Radio Corp.* the Court said: 'It is well established that a conspiracy to restrain the domestic or foreign commerce of the United States to which any American company is a party violates the Sherman Act irrespective of the fact that the conduct complained of occurs in whole or in part in foreign countries.'¹ Here the conduct complained of seems to have occurred wholly in Canada, Australia and the United Kingdom.

The 'effects doctrine' has been criticized by a number of writers,² who invoke the analogy of criminal law to argue that a State has no jurisdiction unless a *constituent element* of an *act* forbidden by antitrust law has occurred on that State's territory.³ Only in this way, they say, can the jurisdiction of States be kept within reasonable bounds, because many acts done by a large company in a single country will have effects all over the world and it would be absurd to allow a virtually universal jurisdiction in such circumstances. Such criticisms have occasionally been supported by government statements,⁴ although protests by foreign governments have usually been against the type of orders made by United States courts, not against the initial assumption of jurisdiction on the basis of the effects doctrine.⁵ The Netherlands antitrust law applies only to acts done on Netherlands territory,⁶ and the Japanese Anti-Monopoly Act applies only to acts done on Japanese territory.⁷

It is doubtful, however, whether the criminal law analogy really does support the 'constituent elements' approach.⁸ Moreover, it is often difficult to say what the constituent elements of a breach of antitrust law are. Restrictive practices can take so many different forms that laws do not attempt to list and define the constituent elements of every kind of forbidden practice in detail; instead, antitrust laws usually consist of a general prohibition of restrictive business practices (e.g. the Sherman Act and the opening words of Article 85 of the E.E.C. Treaty), supplemented by a more explicit condemnation and definition of specific practices (e.g. the Clayton Act and the examples listed in Article 85 (1) of the E.E.C. Treaty). The general prohibition (and also, but less frequently, the explicit condemnation of specific practices) define the forbidden practices by reference to

¹ (1965), 239 F. Supp. 51, 78; affirmed (1969), 395 U.S. 100. See below, pp. 202-3 and 207 n. 2.

² Mann, loc. cit. (above, p. 147 n. 1), pp. 102-6, and the authors cited by him.

³ See above, pp. 152-3.

⁴ *British Practice in International Law* (1967), p. 60. But see below, p. 199 n. 5.

⁵ See below, pp. 210-12.

⁶ Smit, *Nederlands Tijdschrift voor Internationaal Recht*, 5 (1958), pp. 274, 294-5.

⁷ I.L.A. (1964), pp. 453-4.

⁸ See above, pp. 153-5.

their economic effects;¹ in other words, such effects are a constituent element of the offence, so that the difference between the 'constituent elements' approach and the 'effects' approach is non-existent. For instance, the Sherman Act prohibits agreements in restraint of trade; the existence of such restraint is a constituent element of the offence. Article 85 of the E.E.C. Treaty prohibits agreements, decisions and concerted practices which have the effect of preventing, restricting or distorting competition; the existence of that effect is a constituent element of the offence. Such effects are also a constituent element of an offence in France,² Denmark,³ Belgium,³ Argentina⁴ and many other countries.⁵

It may be that supporters of the 'constituent elements' approach wish to confine the jurisdiction of a State to cases where the defendant has performed some physical act in that State's territory.⁶ But criminal law analogies do not justify this limitation (a man who posts a libellous letter from State *A* to an address in State *B* has performed a physical act only in State *A*, but it is settled law that State *B* also has jurisdiction, even under the constituent elements approach);⁷ and there is no convincing reason for adopting a stricter approach in antitrust law.⁸ Moreover, acceptance of this limitation would lead to serious gaps in the law. For instance, no State would be able to claim jurisdiction over omissions, despite the fact that many types of restrictive business practices, particularly boycotts and allocation of markets, can be implemented by means of omissions without positive acts.⁹ Other types of evasion would also be facilitated; for instance,

¹ It is true that sometimes the mere existence of a prohibited practice constitutes an offence, without any need to prove that it has undesirable effects. But these *per se* violations, as they are called in the United States, represent an exception which is more apparent than real. They are based on a belief, founded on economic theory or experience, that such practices will always lead to undesirable results, so that it is unnecessary to prove such effects in each case.

Sometimes intention to produce effects constitutes an alternative basis of liability, even though those effects are not produced in fact. Such cases bear the same relationship to acts causing such effects as attempts to commit a crime bear to the principal crime. Note that in the criminal law relating to attempts it does not matter that the *actus reus* of the attempt was committed abroad, provided that the accused intended to commit the principal offence within the territory of the State claiming jurisdiction; see above, p. 154 n. 2.

² Goldman, *Recueil des cours*, 128 (1969), pp. 631, 666-7.

³ Quoted by van Hecke, *ibid.* 106 (1962), p. 289.

⁴ I.L.A. (1968), pp. 353-6.

⁵ See below, pp. 198-9, 201; and see Goldman, *loc. cit.* (above, n. 2), pp. 651-88, 701.

⁶ Jennings, *Recueil des cours*, 121 (1967), pp. 327, 521.

⁷ See above, p. 152 n. 3.

⁸ It is true that rules of antitrust law vary far more from State to State than rules of criminal law do (and far more than the Advocate-General Mayras apparently realized in the *Dyestuffs* case, *Recueil de la jurisprudence* (1972), pp. 619, 700), but that does not justify any distinction; see above, p. 154 n. 1.

⁹ A company boycotting a potential customer need not expressly reject the potential customer's offer to buy; it can simply remain silent.

Similarly the essential feature of an allocation of markets is that the parties refrain from selling in one another's markets. This omission may be accompanied by positive acts (e.g. a company in State *A* which receives offers to buy from potential customers in State *B* may write and advise them to address their offers to a company in State *B*, and it may also instruct its distributors not to export to State *B*), but such positive acts are not always necessary (e.g. the company could

exporters in State *A* who rigged the price of the goods which they sold in State *B* could escape the jurisdiction of State *B* by selling to a middleman in State *C* and leaving him to resell the goods in State *B*. Businessmen could escape the jurisdiction of the State where the real effects of the transaction were felt, by making their contracts, taking delivery of goods and making payments in some 'antitrust haven'.

The United States is not the only State which claims jurisdiction over the effects of acts done abroad. Article 85 of the E.E.C. Treaty prohibits agreements, decisions and concerted practices which have the effect of preventing, restricting or distorting competition.¹ It might be rash to conclude as a matter of textual exegesis that Article 85 was intended to cover the effects of acts done outside the E.E.C., but that is how it is applied in practice. A number of decisions by the Commission and by the Court of Justice of the European Communities claim jurisdiction on the basis of effects, but these cases are not very clear because they are concerned either with distributorship agreements between foreign manufacturers and E.E.C. distributors,² or with agreements whereby a foreign company agreed with an E.E.C. company not to compete in the E.E.C.,³ and there can hardly be any dispute about the right of the E.E.C. to apply Article 85 to such agreements. The question arose in a more acute form in *Imperial Chemical Industries, Ltd. v. Commission of the European Communities*, where it was alleged that I.C.I. had participated in a price-ring to raise the price of dyestuffs which it exported from the United Kingdom to the E.E.C. (this was before the United Kingdom joined the E.E.C.). I.C.I. argued that the sales must be regarded as taking place in the United Kingdom; although such sales had effects in the E.E.C., it was contrary to international law for the E.E.C. to claim jurisdiction solely on the basis of such effects.⁴ The Commission maintained that international law did permit jurisdiction to be based on effects felt within the territory as a result of acts done abroad; it also argued that I.C.I. had actually committed acts within the E.E.C.⁵ The Court found for the Commission on the latter point and therefore found it unnecessary to consider the former point,⁶ but the Advocate-General

simply refrain from replying to letters from potential customers in State *B*, and there would be no need to forbid its distributors to export to State *B* if such exports would for one reason or another be unprofitable for the distributors in any case).

¹ This wording has been imitated in Article 15 (1) of the E.F.T.A. Convention and in Article 1 (2) of the Spanish law of 1963 (I.L.A. (1964), p. 466).

² *Martens and Straet/Bendix, Common Market Law Reports* 3 (1964), p. 416; *Béguelin Import Co. v. S.A.G.L. Import Export* (1971), *Recueil de la jurisprudence* (1971), pp. 949, 959; *Common Market Law Reports* (1972), pp. 81, 95.

³ *Grosfillex/Fillistorff, International Legal Materials*, 3 (1964), p. 418.

⁴ *Recueil de la jurisprudence* (1972), pp. 619, 624-7, 631-2.

⁵ *Ibid.*, pp. 627-30, 633-5.

⁶ *Ibid.*, pp. 665-7; *Common Market Law Reports* (1972), pp. 557, 628-9. See also below, pp. 452 and 455 w. 8.

Mayras advised that international law permitted jurisdiction to be based on effects felt within the territory as a result of acts done abroad.¹

Municipal laws often have little to say about international aspects of antitrust; any provisions which they may contain about their territorial or extraterritorial scope of application are frequently so loosely drafted that it would be dangerous to base any conclusions on them in the absence of decided cases.² But a few municipal laws do make a fairly clear claim to jurisdiction on the basis of the 'effects doctrine'. For instance, Article 98(2) of the West German Act against Restraints on Competition (1957) provides that the Act applies 'to all restraints on competition which have effect [literally, which work themselves out] in the area to which this Act applies, even if they result from acts done outside such area'. Swiss case-law speaks in similar terms.³

Clearly it would be intolerable if jurisdiction could be exercised by every State where effects were felt, no matter how remote and slight those effects might be. Equally it would be intolerable if jurisdictional rules were so stringent that some restrictive practices lay outside the jurisdiction of any State.⁴ It is submitted that the best way of resolving *conflits de compétence positifs et négatifs* is to limit jurisdiction to the State where the primary effect of the act is felt. In order to determine whether the effects are primary or secondary, two factors should be considered: (1) are the effects felt in one State more direct than the effects felt in other States?⁵ (2) are the effects felt in one State more substantial than the effects felt in other States?⁶

This approach is supported by a good deal of authority. In the *Alcoa* case Judge Hand was clearly aware of the absurd results and 'international complications' which would be caused by applying the Sherman Act to slight and remote effects of acts done abroad.⁷ In the *General Electric* case

¹ *Recueil de la jurisprudence* (1972), pp. 692-703; *Common Market Law Reports* (1972), pp. 593-608.

² On the difficulties of interpreting the [U.K.] Restrictive Trade Practices Act, 1956, see Lever in *International and Comparative Law Quarterly* (1963), Supplement No. 6, pp. 117-30.

³ Federal Tribunal, 21 March 1967 (*Recueil officiel du Tribunal fédéral* 93, II, p. 192; quoted in *Recueil de la jurisprudence* (1972), pp. 619, 695-6, and *Common Market Law Reports* (1972), pp. 557, 598). See also the *Librairie Hachette* case, *Journal de droit international*, 97 (1970), p. 434.

⁴ See above, p. 192.

⁵ The reference in Article 66 of the E.C.S.C. Treaty to direct or indirect effects is not in reality incompatible with this approach; see Prieur, *Journal de droit international* (1955), pp. 806, 810.

⁶ Cf. above, pp. 154-5. This double approach is somewhat similar to those adopted by Goldman, *Recueil des cours*, 128 (1969), p. 631, by the Advocate-General Mayras in the *Dyestuffs* case, *Recueil de la jurisprudence* (1972), pp. 619, 699-702, and by s. 18 of the *Restatement, Second, Foreign Relations Law of the U.S.* (1965). Stokes, *Proceedings of the American Society of International Law*, 64 (1970), pp. 135, 138, gives examples illustrating the difference between direct and indirect effects.

⁷ See the passage quoted from his judgment above, pp. 193-4, and cf. his judgment in *Marienelli v. United Booking Offices of America* (1914), 227 Fed. 165, 168-9.

the Court spoke of 'direct and substantial effects on trade'.¹ In *Alfred Bell & Co. Ltd. v. Catalda Fine Arts, Inc.* United States courts held that the Sherman Act did not apply to restraints on production in the United Kingdom when only a small percentage of the goods produced were sold in the United States.² In the *Swiss Watches* case Judge Cashin said: 'A United States court may exercise its jurisdiction as to acts and contracts abroad if, as in the case at bar, such acts and contracts have a substantial and material effect upon our foreign and domestic commerce.'³ It is the policy of the United States Department of Justice not to take action against mere incidental restraints only indirectly affecting the United States economy;⁴ the Sherman Act prohibits acts 'in restraint of trade . . . with foreign nations', not *in* foreign nations.

In the past the British Government has conceded that jurisdiction may be based on substantial effects felt within the territory as a result of acts done abroad.⁵ The laws of Belgium, the Netherlands and Denmark apply to acts which exercise a predominant or substantial influence on the domestic market.⁵ The general opinion in Germany is that Article 98 (2) of the German Act covers only acts which have a direct effect in Germany.⁵

In some cases it may be relevant to take account of the parties' intentions and motives.⁶ In particular, effects which would normally be too indirect to fall within a State's jurisdiction may be brought within its jurisdiction by virtue of the parties' intentions and motives. This is obviously necessary in order to prevent evasion of the law (*fraude à la loi*).⁷

¹ (1949), 82 F. Supp. 753; (1953), 115 F. Supp. 835. See also J. A. Rahl (ed.), *Common Market and American Antitrust: Overlap and Conflict* (1970), pp. 61-7.

² (1947), 74 F. Supp. 973, 977; (1951), 191 F. 2d 99, 106.

³ (1963), *Trade cases*, § 77, pp. 414, 457. Cf. the *amicus curiae* brief for the Swiss Government: 'The judgment . . . raises the likelihood of infringement upon its [Swiss] sovereignty' because 'certain provisions in the final judgment may be interpreted as regulating commerce between Switzerland and third countries, where such commerce does not *directly* affect the . . . commerce of the United States' (italics added). This criticism is justified; some of the acts which were held to be contrary to United States law (e.g. agreements between Swiss associations and British, German and French associations, whereby the latter agreed not to buy watch parts from persons who were not members of the Swiss associations) produced only indirect effects in the United States: *Trade cases*, § 77, 435-6, 454. The *Swiss Watches* case is discussed at length in Rahl, *op. cit.* (above, n. 1 on this page), Chapter 6.

⁴ Van Cise, *Antitrust Bulletin*, 6 (1961), pp. 145, 147; Jennings, this *Year Book*, 33 (1957), pp. 146, 172.

⁵ *Hansard*, H.C. Deb., vol. 698, col. 1280, quoted in *International and Comparative Law Quarterly*, 13 (1964), p. 146. Cf. above, p. 195 n. 4; Van Hecke, *Recueil des cours*, 106 (1962), p. 289; Goldman, *ibid.* 128 (1969), pp. 631, 660.

⁶ Cf. above, p. 155. Other scholars are divided on this point (see I.L.A. (1966), pp. 55, 110, 141-2), but municipal laws sometimes prohibit acts which are intended to produce a certain effect, even when that effect is not produced in fact; this is so in the E.E.C. (Art. 85), the United States (Fugate, *Foreign Commerce and the Antitrust Laws* (1958), p. 47), Austria (Mann, *loc. cit.* (above, p. 147 n. 1), p. 103), Norway (van Hecke, *Recueil des cours*, 106 (1962), pp. 287-8), E.F.T.A. (Art. 15 (1) (a)) and France (Goldman, *ibid.* 128 (1969), pp. 631, 666-7). See above, pp. 154 n. 2 and 196 n. 1.

⁷ See the examples mentioned above, pp. 196-7.

But this rule is not limited to preventing evasion of the law. It has been applied in a number of United States cases which had nothing to do with evasion of the law.¹ Indeed, it is only in this way that the decision in *Alcoa* can be justified.² Reductions in exports to the United States as a result of restrictions on production outside the United States would normally have been too indirect an effect to justify United States jurisdiction,³ but the Court held that the Sherman Act applied because the parties *intended* to affect exports to the United States. The only cause for misgivings about the case is the excessive ease with which the Court found that such an intention existed; in the *General Electric* case the Court went even further by relying on the maxim that a man must be deemed to intend the natural consequences of his acts—the alien defendant knew or should have known that its conduct would have anticompetitive effects on United States commerce, and proof of specific intent was therefore unnecessary.⁴ However, the general rule is that conduct abroad which has only indirect effects on the United States is not subject to United States law unless there is proof of specific intent to affect the United States.⁵

It is only by reference to motives that one can explain the exercise of jurisdiction over omissions.⁶ As a general rule, no State is entitled to pass a law obliging people in other States to trade with it;⁷ such people may have legitimate reasons for not wishing to trade (for instance, in the *Swiss*

¹ Intention is not normally a necessary condition for liability in the United States (*Yale Law Journal*, 70 (1957), pp. 259, 262–3, although cf. Jennings, this *Year Book*, 33 (1957), pp. 146, 172), but a party's intention can bring his acts within the reach of United States law in circumstances where they would otherwise have been outside United States jurisdiction.

² See above, pp. 193–4. The same is true of *Occidental Petroleum Co. v. Buttes Gas and Oil Co.* (1971), *American Journal of International Law*, 65 (1971), p. 815, where the plaintiff alleged that the defendant had interfered with the plaintiff's production of oil in the Persian Gulf, thereby restricting the plaintiff's exports of oil to the United States. The Court held that United States antitrust law applied, but held that it had no jurisdiction for other reasons.

³ If the defendants had specifically agreed to restrict exports as such, the United States would probably have had jurisdiction (see below, pp. 202–3). The economic effect on the United States is the same in both cases, but the United States has jurisdiction in the one case because the effect is the direct result of the defendants' acts, but not in the other case because the effect is an indirect result of acts which have produced their direct effects elsewhere. Economists may call this position illogical (Hale and Hale, *Texas Law Review*, 31 (1953), pp. 493, 533), but it is no more illogical than other distinctions made by the law; for instance, if a thief steals money from a man in State *A* with the result that the victim has no money to pay his creditor in State *B* for goods which the creditor has sent him from State *B* to State *A*, *B* has no jurisdiction, but *B* would have jurisdiction if a man in State *A* fraudulently induced the creditor to send him goods from State *B* to State *A* and never paid for them—yet the loss suffered by the creditor is the same in both cases.

⁴ (1949), 82 F. Supp. 753, 891.

⁵ Brewster, *Antitrust and American Business Abroad* (1958), pp. 83–4.

⁶ But even here some effects may be too indirect to justify jurisdiction, whatever the motives. For instance, if customers in State *A* refused to buy from a factory in State *A* owned by nationals of State *B* because they wanted to prevent remittance of profits to State *B*, it is submitted that the effect on *B* would be too indirect to justify jurisdiction, despite the customers' motives.

⁷ But it could punish its own producers if they made no effort to sell abroad (cf. Oliver, *American Journal of International Law*, 51 (1957), pp. 380 et seq.), and it could also punish its own businessmen if they refused to buy from abroad; here jurisdiction can be based on the nationality (or residence) principle. See also below, pp. 202–3.

Watches case the defendants tried to restrict the export of Swiss watch parts for assembly abroad, because assembly of such parts abroad might cause unemployment in Switzerland and—if they were incompetently assembled—harm the reputation of the Swiss industry).¹ But a State would be entitled to claim jurisdiction if it could show that the refusal to trade was intended to implement a scheme for allocating markets or to punish a would-be customer for not joining a cartel.² Allocation of markets clearly falls within the jurisdiction of every State whose territory is the object of such allocation,³ and a State is also entitled to claim jurisdiction over traders in foreign countries who boycott one of its own traders.⁴ Probably any agreement between foreign manufacturers to limit their exports to another State raises a suspicion of improper motives and is thus *prima facie* subject to the jurisdiction of that other State, unless the suspicion of improper motives can be rebutted. West Germany and the E.E.C. have claimed jurisdiction over agreements among Japanese manufacturers to limit exports to West Germany and the E.E.C.⁵

The 'primary effects' approach enables jurisdiction to be exercised by States which have a legitimate interest and prevents its being exercised by States which have no legitimate interest in exercising jurisdiction. But it does not altogether eliminate concurrent jurisdiction; the effects felt in two or more States may be equally direct or equally substantial, or direct but insubstantial effects in one State may be counter-balanced by indirect but substantial effects in another State. Taking the defendants' motives and intentions into account may also add to the number of States entitled to exercise jurisdiction. However, even in such cases the number of States entitled to exercise jurisdiction will usually be small.

Concurrent jurisdiction exists whenever a company carrying on business in one State merges with or acquires a company carrying on business in another State.⁶ Even so, in accordance with the 'primary effects' approach,

¹ In so far as the judgment in the *Swiss Watches* case tried to strike down such restrictions, it constituted an excess of jurisdiction; compare sections IV (c) and XI (E) (3) of the revised final judgment.

² Van Hecke, I.L.A. (1966), p. 55; and see above, p. 196 n. 9. *Contra*, Raymond, *American Journal of International Law*, 61 (1967), p. 558.

³ See above, pp. 192–3, 196–7. For German law, see Baruch, *Wirtschaft und Wettbewerb* (1961), p. 537.

⁴ France claims such jurisdiction, according to Mezger, *Revue critique de droit international privé* (1963), p. 43, but Mezger's opinion is contradicted in H. M. Blake (ed.), *Business Regulation in the Common Market Nations* (1969), vol. 2, pp. 310–11. The United States exercised such jurisdiction in the *Swiss Watches* case (1963), *Trade cases*, § 77, p. 414.

⁵ *The Times*, 12 July 1972, p. 18; *ibid.*, 14 July 1972, p. 21; *Journal officiel des Communautés européennes* (No. C-111, 21 October 1972). It is arguable that the *Swiss Watches* case can be justified on this ground, but the better view is that the United States should have dropped the charges concerning prohibitions on the export of watch parts when it became clear that there were legitimate reasons for such prohibitions (cf. above, n. 1 on this page).

⁶ *U.S. v. Jos. Schlitz Brewing Co.*, 253 F. Supp. 129 (affirmed (1966), 385 U.S. 37); 4 *Canadian Year Book of International Law*, 4 (1966), pp. 266–7; *ibid.*, 5 (1967), p. 310; *International Bar*

it is submitted that jurisdiction can be exercised only by a State in which one of the companies carries on the greatest part of its business; it would be intolerable if a merger which was regarded as economically desirable by the States primarily concerned could be prevented by a State in which one of the companies transacted a very small amount of business. In *U.S. v. CIBA Corporation* the United States attacked the proposed merger of two Swiss chemical corporations, which appears at first sight to be an excess of jurisdiction; but the ground of complaint was that the resulting merger of their *United States subsidiaries* would lessen competition in the United States.¹

Concurrent jurisdiction also exists over agreements regulating the quantities or prices of goods exported from one State to another.² The exporting State and the importing State are equally affected by such agreements.³ It is true that exporting States often exempt cartels from their antitrust laws, but such exemptions are based, not on a belief that States are not entitled to regulate export cartels, but on a cynical belief that it is in the State's interests to allow its businessmen to combine against foreign buyers and competitors. Besides, such exemptions are seldom complete; States reserve the power to intervene if the cartel has the effect of reducing the total volume of exports.⁴ In *Zenith Radio Corp. v. Hazeltine Research Co.* the United States exercised jurisdiction over a Canadian cartel which prevented the appellant's exporting television sets from the United States to Canada; the members of the cartel refused to grant the appellant Canadian patent-licences and sued the appellant for infringing their Canadian

Journal (November 1971), p. 28 (German law); [U.K.] Fair Trading Act, 1973, s. 64; *Common Market Law Reports* (1972), D11; E.C.S.C. Treaty, Art. 66.

Jurisdiction may also be exercised by each of the States whose nationality any of the companies possesses (see below, pp. 206-7), but jurisdiction founded on nationality cannot be exclusive—a company may have the nationality of one State and yet carry on almost all of its business in another State.

¹ (1970), *Trade cases*, § 73, p. 269.

² Van Hecke, *Recueil des cours* 106 (1962), p. 321; Markert, *Virginia Journal of International Law*, 7 (1967), pp. 47, 53-4.

³ Attempts to confer jurisdiction on one State to the exclusion of the other, based on the law governing the contract of sale, on the place where delivery takes place, or on the difference between c.i.f. and f.o.b. contracts (cf. *I.C.I. v. Commission of the European Communities*, *Recueil de la jurisprudence* (1972), pp. 619, 626, 631) cannot be accepted as stating the law; they would cause artificiality and complexity, and open up ways of evading the laws of the States concerned (cf. above, pp. 196-7).

Schwartz, in *Kartell und Monopolie im modernen Recht* (1961), vol. 2, pp. 709, 717, argues that the importing State has jurisdiction and that the exporting State has not. His view seems to be based on the idea that antitrust law exists for the benefit of the consumer; but the exporting State also has an interest in protecting its balance of payments and the good reputation of its manufacturers in general (both of which could be jeopardized if manufacturers of a particular product raised their export prices too high and priced themselves out of the market).

⁴ [Canadian] Combines Investigation Act, 1952, s. 32; *U.S. v. Learner Co.* (1963), 215 F. Supp. 603; Brewster, *Antitrust and American Business Abroad* (1958), Chapter 6; [U.K.] Fair Trading Act 1973, s. 8.

patents whenever the appellant exported television sets to Canada.¹ Importing States also claim jurisdiction over certain kinds of practices which restrict exports to them from other countries;² and in *U.S. v. R. P. Oldham Co.* the United States exercised jurisdiction over an agreement between Japanese exporters and United States importers which provided that the Japanese exporters should not sell to other United States importers who were not parties to the agreement.³ In the *Swiss Watches* case the United States exercised jurisdiction over an agreement between Swiss and United States companies fixing the prices of watches exported from Switzerland to the United States.⁴ In *Imperial Chemical Industries, Ltd. v. Commission of the European Communities* the Advocate-General Mayras considered that I.C.I. could be punished by the Commission for rigging the prices of its exports to the E.E.C.⁵

Similar considerations apply to the carriage of goods by sea. Ship-owners often form 'conferences' and grant preferential treatment to shippers who promise to use only ships belonging to conference-members. This reduces competition, but unlimited competition would probably lead to enormous fluctuations in shipping rates which would be in nobody's interests in the long run. The United States Government has traditionally been hostile to shipping conferences, but its right to regulate the activities of shipping conferences has been challenged by other States.⁶

The level of shipping rates obviously affects the State from which the goods are exported (high shipping rates might price its goods out of the export markets), the State into which the goods are imported (high shipping rates increase the cost of living) and the State whose nationality the ship possesses (low shipping rates would drive the ship-owner out of business).⁷ Since the effects on one of these States cannot be said to be more direct or more substantial than the effects on the other two, all three have concurrent jurisdiction.⁸ On the other hand, the United States would have no right to

¹ (1969), 395 U.S. 100. The respondent, one of the members of the cartel, was a United States corporation; see below, p. 207 n. 2. See also *Continental Ore Co. v. Union Carbide and Carbon Corporation* (1962), 370 U.S. 690.

² See above, p. 201. United States companies break United States law if they agree not to import into (or export from) the United States: Fugate, *Foreign Commerce and the Antitrust Laws* (1958), Chapter 4. For foreign companies see *Common Market Law Reports* (1974), p. 489.

³ (1957), I.L.R., vol. 24, p. 673; (1960), *Trade cases*, § 69, p. 763.

⁴ (1963), *ibid.*, § 77, p. 414.

⁵ (1972), *Recueil de la jurisprudence* (1972), pp. 619, 692-703; *Common Market Law Reports* (1972), pp. 557, 593-608. And see above, pp. 197-8.

⁶ For a good account of the legal and economic issues involved, see Chayes, Ehrlich and Lowenfeld, *International Legal Process* (1968), vol. 1, pp. 384-488.

⁷ It is debatable whether the nationality of the ship should be determined by reference to registration or to ultimate beneficial ownership. But that does not affect the basic point, which is that concurrent jurisdiction is exercised not only by the State whose nationality the ship possesses (however nationality is defined) but also by the exporting State and the importing State.

⁸ The situation might be different if two of the three connecting factors pointed to only one State, e.g. if a Japanese ship carried goods from Britain to Hong Kong, or if a British ship carried

regulate the carriage of goods between Mexico and Europe on foreign ships (even though such carriage may have indirect effects on the United States),¹ unless the contract was made in the United States.²

In this context the 'constituent elements' approach produces the same results as the 'primary effects' approach.³ Foreign governments have protested that the United States has no right to regulate contracts made and performed abroad,⁴ but, as a United States court pointed out in *Armement Deppe v. United States*, a contract for the carriage of goods to the United States on a foreign ship is performed in part in the United States, because it is not 'consummated' until the ship arrives in a United States port.⁵ Even when the United States claims jurisdiction, not over a contract between shipper and ship-owner, but over an agreement between foreign ship-owners fixing the rates which they are going to charge, the result is the same, because the agreement is not performed until the ship-owners carry goods to the United States at the rates fixed; the United States can therefore rely on the rule that a State has jurisdiction over a conspiracy formed abroad when any overt act implementing the conspiracy occurs within its territory.⁶

goods from Britain to Japan. Here it might be argued that the contacts with one State outweighed the contacts with the other, so as to give the first State exclusive jurisdiction. Cf. *Lauritzen v. Larsen*, above, p. 184.

¹ See the protest of the United Kingdom government reported in I.L.A. (1964), p. 404. In fact the United States does not seek to apply its law in such circumstances, although it claims the right to exclude from United States ports foreign ships which have carried goods between foreign ports at rates which the United States regards as objectionable (46 U.S.C. 813).

It is controversial whether a State may exclude foreign ships from its ports (Brownlie, *Principles of Public International Law* (2nd ed., 1973), pp. 276-7; Greig, *International Law* (1970), pp. 228-9; Colombos, *The International Law of the Sea* (6th ed., 1967), pp. 176-7; *Foreign Relations of the U.S.* (1932), vol. 1, pp. 920, 922-3, 925, 932; *ibid.* (1934), vol. 1, p. 685; *ibid.* (1935), vol. 1, p. 469; *ibid.* (1936), vol. 1, pp. 609 et seq.); United States practice is inconsistent (Moore, vol. 2, pp. 269-70, and vol. 5, p. 740; Hyde, *International Law* (2nd ed., 1947), vol. 1, pp. 577-8, 581-2). But the United Kingdom Government admits that a State is entitled to exclude foreign ships (McNair, *International Law Opinions* (1956), vol. 2, p. 162; *Hansard*, H.C. Deb. (1964), vol. 688, cols. 1243, 1279-80). See also *Institut de Droit International*, resolution of 1957.

² *In re Grand Jury Investigation of the Shipping Industry* (1960), I.L.R., vol. 31, pp. 209, 211-14. Jurisdiction here is justified under the subjective territorial principle. But see above, p. 193 n. 2.

³ If anything, the 'primary effects' approach limits jurisdiction more than the 'constituent elements' approach, because it could be argued that the 'constituent elements' approach, unlike the 'primary effects' approach, would enable jurisdiction to be exercised by any State whose waters were traversed during the journey.

⁴ I.L.A. (1964), pp. 579-81; *Annuaire français de droit international* (1964), p. 701.

⁵ (1968), 399 F. 2d 794; c.d. (1969), 393 U.S. 1094. Previous cases had merely spoken of effects on United States commerce.

In reality, the contract is performed in all three States (the ship being treated as if it were the territory of the flag State for this purpose). For an example of jurisdiction being exercised by the flag State, see *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.* (1968), *American Journal of International Law*, 63 (1969), p. 825. At one time the United States and Danish Governments seem to have thought that the flag State had exclusive jurisdiction (*Foreign Relations of the U.S.* (1934), vol. 1, pp. 685, 701; *ibid.* (1935), vol. 1, pp. 469, 474-5, 478-80), but no State takes that view nowadays.

⁶ See above, p. 154 n. 2.

One cannot evade this conclusion by invoking the rule that the flag State has exclusive jurisdiction over crimes committed on board a merchant ship in a foreign port. For a start, it is disputed whether this rule is based on international law or on comity. Even States which say that it is based on international law¹ admit that there is an exception when the effects of the crime extend to the coastal State. The effects of the price charged for carrying goods from one State to another obviously extend to the exporting State and to the importing State.

Moreover, in other fields United States law has been applied to the carriage of goods or persons on foreign ships to or from United States ports, without provoking protests from other States.² This is true of laws prescribing humane standards for the transportation of cattle,³ invalidating exemption clauses⁴ or requiring steamship companies which had brought ineligible immigrants to the United States to take them back without charge to their country of origin.⁵ It is unlawful for foreign ships to leave a United States port overloaded⁶ or without an efficient radio installation in operating condition.⁷ Foreign ships embarking passengers at United States ports are required to provide evidence that they will be able to meet claims for injury to the passengers.⁸ The United Kingdom claims power to detain foreign ships entering United Kingdom ports if they do not comply with United Kingdom standards of seaworthiness;⁹ it is contrary to Belgian criminal law for foreign ships to leave a Belgian port or sail in Belgian territorial waters without a certificate of seaworthiness.¹⁰ The United Kingdom admits that a foreign State may impose fines for trifling errors in the manifest of cargo aboard a British ship.¹¹

¹ Some States argued that *Cunard v. Mellon* (1923), 262 U.S. 100, was contrary to international law on this ground: *Foreign Relations of the U.S.* (1923), vol. 1, pp. 134, 142-3, 170.

² See also above, p. 184.

³ Hackworth, vol. 2, p. 222 ('the offence, assuming that it originated at the port of departure in Formosa, was a continuing one, and every element necessary to constitute it existed during the voyage across the territorial waters. The completed forbidden act was done within American waters . . .').

⁴ *Knott v. Botany Mills* (1900), 179 U.S. 69, where the plaintiff recovered damages for an injury occurring on a foreign ship in a foreign port. The Harter Act provides that fines may be imposed for breach of the Act, but there are apparently no recorded cases where this has happened. See generally Ehrenzweig, *Private International Law: General Part* (1967), pp. 211-15.

⁵ *U.S. v. Norddeutscher Lloyd* (1912), 223 U.S. 512.

⁶ Hyde, *International Law* (2nd ed., 1947), vol. 1, p. 738. United Kingdom law is the same (*ibid.*); see also Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), pp. 177-8, and Hsiung, *Law and Policy in China's Foreign Relations* (1972), p. 116.

⁷ 47 U.S.C. 351.

⁸ Whiteman, vol. 9, pp. 243-7.

⁹ *British Practice in International Law* (1964), p. 59. When the Plimsoll Act was passed in the United Kingdom in 1876, the United States doubted whether the United Kingdom was entitled to act in this way (Moore, vol. 2, pp. 282-3), but no more has been heard of these doubts for almost a century.

¹⁰ Law of 25 August 1920 on the safety of ships, Art. 1.

¹¹ McNair, *International Law Opinions* (1956), vol. 2, p. 162; *Hansard*, H.C. Deb. (1964), vol. 688, cols. 1244, 1279-80.

The concurrent jurisdiction exercised by the exporting State, the importing State and the flag State creates a risk that the laws of one State will conflict with the laws of another; but the same is true whenever an act is committed partly in one country and partly in another, or causes equal effects in more than one State. Indeed, the very possibility of retorsion inherent in such a situation provides some deterrent against arbitrary action by each of the States concerned. However, arbitrary action is not synonymous with lack of jurisdiction; a State would act arbitrarily if it required resident foreigners to wear a hat all the time and one might criticize such a law on many grounds, but one cannot argue that the State lacked jurisdiction to make the law. If there is a conflict between the laws of States having concurrent jurisdiction, the only solution is an international agreement.

Nationality principle

Mann argues that the nationality principle is not a valid basis of jurisdiction in antitrust cases, partly because 'a restrictive practice is not necessarily a heinous practice'.¹ But there is no evidence that jurisdiction over ordinary crimes committed by nationals abroad is subject to any requirement that the offence charged need contain any element of moral wickedness, and there is no logical reason for adding such a requirement in antitrust cases. Besides, not everyone would agree that restrictive practices are not necessarily heinous; for instance, Robert Kennedy, when Attorney-General of the United States, said:

We are talking about clear-cut questions of right and wrong. I view the businessman who engages in such conspiracies in the same light as I regard the racketeer who siphons off money from the public in crooked gambling or the union official who betrays his union members.

Yugoslav anti-monopoly legislation applies to all acts of Yugoslav corporations, regardless of where they occur.² In other countries nationality is not a basis of jurisdiction as such,³ but it is not altogether irrelevant. For instance, United States authorities show much greater zeal in pursuing United States corporations than in pursuing foreign corporations, because one of the 'basic objectives of United States policy in the application of the Sherman Act to foreign arrangements' is 'to prevent national boundaries from providing a safe haven from which it is possible for *Americans* to flout laws designed for the protection of domestic competition in the United

¹ Mann, loc. cit. (above, p. 147 n. 1), pp. 97-8. Jennings, this *Year Book*, 33 (1957), pp. 146, 153-4, seems to admit that jurisdiction may be based on the nationality principle; so does the *Restatement, Second, Foreign Relations Law of the U.S.* (1965), p. 88.

² *Jugoslovenska Revija za Medunarodno Pravo*, 11 (1964), pp. 113-14.

³ But there is no evidence that failure to use nationality as a basis of jurisdiction reflects an *opinio juris* that it is not a valid basis of jurisdiction. There would be nothing startling about jurisdiction over mergers being based on the nationality principle; see above, pp. 201-2.

States'.¹ While ostensibly claiming jurisdiction on the territorial principle, United States courts have sometimes emphasized the United States nationality of the parties, as if to imply that this could compensate for the tenuousness of the territorial nexus between the offence and the United States.² And the nationality of the defendant makes a difference to the type of orders issued at the conclusion of an antitrust case.³

Other bases of jurisdiction

It is uncertain whether the protective principle is a valid basis of jurisdiction in antitrust cases.⁴ In *Imperial Chemical Industries, Ltd. v. Commission of the European Communities* the Commission invoked the protective principle, but only as an argument in favour of the 'effects doctrine', not as a separate head of jurisdiction;⁵ the point was not discussed by the Advocate-General or the court. There is no known example of a State claiming jurisdiction on this ground. The distinguishing feature of the protective principle is that it covers only offences against the State, not offences against individuals; otherwise the protective principle would be indistinguishable from the passive personality principle, which is a much more doubtful basis of jurisdiction. It is therefore submitted that Verzijl is right in saying that the protective principle could only be used against restrictive practices which threaten the whole economic structure of the State;⁶ and restrictive practices of this degree of gravity are hard to imagine.

As for the passive personality and universality principles, it has been suggested⁷ that these principles can only be applied where the offence is also contrary to international law or the *lex loci*; restrictive business practices are not prohibited by international law, and the law relating to them varies so much from State to State that it would be very difficult to comply with the double 'criminality' requirement. At all events, no State has ever claimed jurisdiction on these grounds.

Conflicts of jurisdiction

The general rule of international law relating to criminal jurisdiction is that the existence of concurrent jurisdiction does not, by itself, oblige one

¹ Brewster, *Law and United States Business in Canada* (1960), p. 15 (italics added).

² *Branch v. Federal Trade Commission* (1944), 141 F. 2d 31; *Annual Digest*, 1943-45, p. 169. Nationality, like the defendant's intentions and motives (cf. above, pp. 199-201), may perhaps give a State jurisdiction under the territorial principle over effects which would otherwise have been too remote to justify jurisdiction. See also *Hazeltine Research, Inc. v. Zenith Radio Corp.*, above, pp. 195, 202-3.

³ *Restatement, Second, Foreign Relations Law of the U.S.* (1965), p. 123.

⁴ Brewster, *Antitrust and American Business Abroad* (1958), pp. 295-9; Martin, I.L.A. (1964), p. 333; Rahl (ed.), *Common Market and American Antitrust: Overlap and Conflict* (1970), pp. 397-401.

⁵ (1972), *Recueil de la jurisprudence* (1972), pp. 619, 629.

⁶ *Nederlands Tijdschrift voor Internationaal Recht*, 8 (1961), pp. 29-30.

⁷ Above, pp. 162-6.

State to give way to the other, even when the act forbidden by one State's law is permitted or even required by the other's.¹ Since so many of the rules governing jurisdiction in antitrust cases have been based on criminal law analogies, there seems to be no valid reason for not adopting this rule also. However, there are a number of exceptions to the general rule which may not be relevant in many criminal cases, but which are frequently extremely relevant in antitrust cases. This is particularly true of the rule that a State may not exercise jurisdiction over acts done abroad if the exercise of such jurisdiction would obstruct the economic policy of the State where the acts were performed.² Exercise of such jurisdiction would also constitute an illegal abuse of rights if the State claiming jurisdiction had no legitimate interest in enforcing its own law³ and if the enforcement of its law would cause serious mischief in another State.⁴

It must be admitted that these suggestions are based mainly on reason rather than on evidence of State practice, although it is significant that the United Kingdom Government has declared that a State may apply its antitrust law to the activities of its nationals abroad 'only provided that this does not involve interference with the legitimate affairs of other States'.⁵ United States courts do not usually stay their hand when application of United States law would run counter to the policy of the State where the acts in question occurred.⁶ All the same, they do refrain (albeit without suggesting that such restraint is required by international law) from applying United States law if the acts forbidden by United States law were required by the *lex loci*⁷ or by an order of the local government.⁸ A number of States have exploited this rule by enacting laws forbidding compliance with United States law in circumstances where United States law runs counter to local economic policy.⁹

¹ See above, pp. 154 at n. 1, 167-9, 178.

² See above, pp. 188-9. Americans sometimes claim that application of United States anti-trust law to foreign cartels benefits foreign consumers; but it is surely for the foreign government to decide what is best for its own people—that is what sovereignty and independence mean.

³ A State does have a legitimate interest if an act done abroad produces effects on its own territory. But would a State have a legitimate interest in applying its antitrust law to acts done abroad (even by its own nationals) which produce no such effects? Probably not.

⁴ See above, pp. 189-90.

⁵ *British Practice in International Law* (1967), p. 60.

⁶ Graziano, *Virginia Journal of International Law*, 7 (1967), pp. 100, 113-16; *U.S. v. The Watchmakers of Switzerland Information Centre* (1963), *Trade cases*, § 77, pp. 414, 456-7 (but the judgment was subsequently altered; see Jennings, *Recueil des cours*, 121 (1967), pp. 327, 523, and below, p. 211). *Contra, U.S. v. Standard Oil of New Jersey* (1960), *Trade cases*, § 69, p. 894.

⁷ Mann, *loc. cit.* (above 147 n. 1), p. 152; *Restatement, Second, Foreign Relations Law of the U.S.* (1965), pp. 114-15, 119-20, 123. The defendant is often required to make bona fide efforts to get the foreign State to relax its attitude, in order to prevent defendants procuring legislation from a foreign State to suit their own interests.

⁸ *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.* (1970), *American Journal of International Law*, 64 (1970), p. 962, which also held that United States courts will not investigate the legality of such an order under the *lex loci*.

⁹ [Netherlands] Economic Competition Act, 1956, s. 39 (1); Jennings, *Recueil des cours*, 121 (1967), pp. 327, 523.

Parent and subsidiary companies

A number of questions concerning the relationship between parent and subsidiary companies have arisen in antitrust law.

Under section 12 of the Clayton Act antitrust proceedings can be brought against a company only in a district where it carries on business.¹ When a foreign company which does not carry on business in the United States participates in a restrictive practice which causes effects in the United States, courts tend to surmount the obstacle of venue by arguing that the foreign company is so closely identified with its United States subsidiary (or parent) company that jurisdiction over the one is the same as jurisdiction over the other. Some of the cases push this argument to startling lengths,² but there is no breach of international law, because there is no rule of international law subordinating the exercise of jurisdiction to a requirement that the company carry on business in the State concerned;³ provided that jurisdiction can be based on some valid ground (such as the territorial principle, nationality principle, etc.) it cannot be defeated by the absence of the defendant individual or company outside the State at the time when proceedings are instituted, because there is no rule of international law against trials *in absentia*, provided that the accused somehow receives notice of the charge.⁴

A problem of a rather different type arose in *Imperial Chemical Industries, Ltd. v. Commission of the European Communities*, where I.C.I. was regarded as having committed acts in the E.E.C. because the acts had been committed by I.C.I.'s E.E.C. subsidiaries which were so closely identified with I.C.I. that their acts could be attributed to I.C.I.⁵ *Qui facit per alium facit per se* is a general principle of criminal law, but it depends on proof that the subsidiary was acting on the instructions of the parent company; such instructions cannot be presumed merely from the possession of a controlling shareholding.⁶ If these rules are disregarded there will be an excess of

¹ This rule of venue is unknown in most European countries: van Hecke, *ibid.* 106 (1962), pp. 322-3.

² Brewster, *Antitrust and American Business Abroad* (1958), pp. 56-61; *International and Comparative Law Quarterly* (1963), Supplement No. 6, pp. 110-14.

³ The United Kingdom thinks otherwise (*British Practice in International Law* (1967), pp. 59-60), but this is surely wrong; see above, n. 1, and below, n. 4, both this page.

⁴ Council of Europe, *Explanatory Report on the European Convention on the International Validity of Criminal Judgments* (1970), pp. 49 et seq.; I.L.R., vol. 38, p. 133; *Gallina v. Fraser* (1960), *ibid.*, vol. 31, p. 356; *R. v. Governor of Brixton Prison, Ex parte Caborn-Waterfield* (1960), *ibid.*, vol. 30, p. 376. The commentary on the Harvard Research Draft Convention thinks otherwise (*American Journal of International Law*, 29 (1935), Supplement, pp. 600-1), but cites little authority. Bormann was tried in his absence by the International Military Tribunal at Nuremberg.

⁵ (1972), *Recueil de la jurisprudence* (1972), pp. 619, 666-7; *Common Market Law Reports* (1972), pp. 557, 629. The Court's judgment is open to criticism on the facts; see Mann, *International and Comparative Law Quarterly*, 22 (1973), pp. 35, 46-50.

⁶ *Contra*, the decision of the Commission of the European Communities in the *Continental Can*

jurisdiction (unless, of course, jurisdiction over the parent can be based on some alternative ground recognized by international law).

The reach of court orders

As the Commission and the Advocate-General pointed out in *Imperial Chemical Industries, Ltd. v. Commission of the European Communities*, there are hardly any examples of States (as opposed to academic writers) protesting against the assumption of jurisdiction by United States courts in antitrust cases; almost all the protests are against the type of orders made by United States courts at the end of the case.¹

United States courts have good reasons for making far-reaching orders in antitrust cases. For instance, if a United States court strikes down a market-division scheme and allows foreign companies to compete in the United States, it seems unfair that foreign companies should be allowed to continue enforcing the scheme by keeping United States companies out of foreign markets. If, as often happens, foreign companies use their patent rights to maintain the market-division scheme, United States courts may be tempted to order them to assign their patents or to grant licences under them to other companies. Such an order was made in *U.S. v. Imperial Chemical Industries, Ltd.*²

But having good reasons for doing something is not necessarily the same as having a legal right to do it.

United States courts claim that they are following precedents established in cases where courts of equity ordered defendants to do or refrain from doing certain acts abroad.³ Such orders usually forbid the defendant to do something, but courts of equity have an equal power to order positive conduct.⁴ The nationality of the defendant is irrelevant;⁵ it is true that in some cases courts have refrained from addressing an injunction to a foreign defendant concerning his conduct abroad, but such abstention has always been based on other considerations, such as the principle of *forum non conveniens*,⁶ or the fact that the injunction would be ineffective,⁷ or the rule

case (1971), *Common Market Law Reports*, 11 (1972), D. 27; but the real point in this case had nothing to do with the parent company's liability for its subsidiary's acts.

¹ (1972), *Recueil de la jurisprudence* (1972), pp. 619, 634-5, 700-1; *Common Market Law Reports* (1972), pp. 557, 605.

² (1952), 105 F. Supp. 215.

³ Cheshire (and P. M. North), *Private International Law* (8th ed., 1970), pp. 457, 497-506; *Massie v. Watts* (1810), 6 Cranch 148; *Ellerman Lines v. Read*, [1928] 2 K.B. 144; Mann, loc. cit. (above, p. 147 n. 1), pp. 147-50.

⁴ Messner, *Minnesota Law Review*, 14 (1930), p. 494; *Columbia Nistri & Carta Carbone v. Columbia Ribbon and Carbon Manufacturing Co.* (1966), *American Journal of International Law*, 61 (1967), p. 614.

⁵ *Carron Iron Co. v. Maclaren* (1855), 5 H.L. Cas. 416, 436-7.

⁶ *Carron Iron Co. v. Maclaren*; *Vanity Fair Mills v. T. Eaton Co. Ltd.* (1956), I.L.R., vol. 23, p. 134.

⁷ *Re Chapman* (1873), L.R. 15 Eq. 75; *Re Vocalion (Foreign) Ltd.*, [1932] 2 Ch. 196.

that injunctions can be used only to enforce rights under the *lex fori*, not rights under foreign law.¹

But all these cases arose out of private law disputes between private parties. The antitrust cases are entirely different; the proceedings were brought by United States authorities in the exercise of their sovereign powers.

In the past, United States courts have tended to look at the question in terms of judicial jurisdiction; jurisdiction to try the case entails jurisdiction to make any orders which are in any way related to the facts of the case. It is submitted that this approach is wrong;² the real question is one of legislative jurisdiction. The power of courts in private law cases to order foreigners to perform acts abroad is a reflection of the rule that international law in principle imposes no limitations on the legislative power of States in private law. But international law does limit the legislative power of States in criminal law and with respect to laws conferring sovereign or prerogative powers on the State. The United States would be the first to admit that it would violate international law if Congress passed a law to expropriate the British patents of British companies, or to compel British companies, under the threat of quasi-criminal sanctions, to grant licences to every applicant to use its British patents. But a law which enables judges to impose such obligations on British companies is just as contrary to international law as an Act of Congress which imposes such obligations.³ International law does not permit a court order to be given a greater extra-territorial reach than a statute,⁴ otherwise a State could evade limitations on its legislative jurisdiction by empowering its courts to make far-reaching orders.

United States courts have disregarded these principles more than once. The most striking example is *U.S. v. The Watchmakers of Switzerland Information Centre, Inc.*, which virtually required the reorganization of the Swiss watch industry in Switzerland, in a way which was contrary to

¹ '*Morocco Bound*' *Syndicate, Ltd. v. Harris*, [1895] 1 Ch. 534; *Vanity Fair Mills v. T. Eaton Co. Ltd.* (1956), I.L.R., vol. 23, p. 134.

² It is true that jurisdiction to try a case carries with it jurisdiction to order the parties to produce relevant documents situated abroad (see above, p. 178), because otherwise the judge would be unable to try the case properly. But the orders made in cases like *U.S. v. Imperial Chemical Industries, Ltd.*, unlike orders for the discovery of documents, are not necessary in order to enable the judge to try the case; they are made at the end of the trial, not at the beginning. Their real purpose is to put it out of the defendant's power to break antitrust law again in the future, but in this respect they often go further than international law allows; State *A* can punish a national of State *B* whose factory in State *B* blows noxious fumes across the border, but it cannot put it out of his power to cause pollution again in the future by expropriating his factory, because a State has no power to expropriate property owned by foreigners abroad.

³ To be precise, a breach of international law occurs only when the order or law is enforced: Verzijl, *Nederlands Tijdschrift voor Internationaal Recht*, 8 (1961), pp. 12-16, and see above, p. 187.

⁴ Conversely, if a State has a right to punish someone for breaking its law, it also has a right to bind him over or enjoin him not to repeat his offence; the court order merely reaffirms an obligation imposed by the law.

long-established Swiss Government policy.¹ The fact that such United States judgments are not recognized by foreign courts² does not prove that such judgments are contrary to international law; one only has to think of the analogy of criminal law and tax law, where foreign judgments are hardly ever recognized, without any implication that the judgments are contrary to international law. But foreign governments have protested that some of the orders made by United States courts in antitrust cases are contrary to international law.³

The usual response of United States courts to such protests is to insert a clause in the judgment providing that defendants (especially foreign defendants) shall not be obliged to do anything in a foreign country which is prohibited by the law of that country (such a clause appeared in the judgment in the *Swiss Watches* case). This saving clause really misses the point of the protests; it is the very existence of the court order which is contrary to international law, and not merely the fact that it obliges a defendant to break foreign law. However, the saving clause, coupled with foreign legislation forbidding parties to comply with such court orders, does have the *practical* effect of nullifying the excess of jurisdiction produced by many orders of United States courts in antitrust cases.⁴

PART IV. RECOGNITION OF THE EXERCISE OF JURISDICTION BY OTHER STATES

1. THE MEANING OF THE LAW OF NATIONS AND OF COMITY

One frequently comes across judicial dicta, particularly in the older cases, stating that the recognition of foreign laws, judgments and acts of State is required by comity or by the law of nations. The meaning of these terms, however, is often far from obvious.

The law of nations

'The law of nations' is a translation of the Latin *ius gentium*, which did not mean international law in the modern sense, but those rules of municipal law which were common to all peoples. The sixteenth- and seventeenth-century writers on international law used the term in the original Latin

¹ (1963), *Trade cases*, § 77, p. 414. Protests by the Swiss Government that the judgment violated international law led to a partial modification of the judgment, but it is submitted that the modification did not go far enough to eliminate the excess of jurisdiction in the original judgment. See I.L.A. (1964), pp. 410-13 and (1966), pp. 67-74.

² *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*, [1953] Ch. 19 (the judgments in the English Court of Appeal are ambiguous on the question whether the United States court order violated international law).

³ Brewster, *Antitrust and American Business Abroad* (1958), pp. 46-7.

⁴ See above, p. 208.

sense as well as in the modern sense of public international law. Grotius's book *De jure belli ac pacis* is not only a book on international law; it is a book on the law common to mankind and nations, and therefore contains large portions devoted to such private law subjects as the law of inheritance. This ambiguity remained common up to (and including) the early nineteenth century.¹

As we shall see in the next two sections, private international law was frequently spoken of as part of the law of nations (in its Latin sense).² Admiralty law on such matters as salvage was likewise described as being part of the law of nations;³ so was the law merchant.⁴ For some years after 1815 French courts argued that marriage was part of the *droit des gens*, because it was common to all peoples, but that adoption was not.⁵

Even today this outlook is sometimes found. Courts still occasionally say that salvage is governed by the *ius gentium*.⁶ In *Jenny and Hedwige R. v. Belgian State* the Brussels Court of Appeal said that 'the right of property is a natural right, deriving from the *ius gentium*, and not a mere civil law right'.⁷ In *Madzimbamuto v. Lardner-Burke* the Rhodesian High Court clearly used *ius gentium* in the Roman law sense when analysing the legal relationship between a ruler's subjects and a usurper.⁸

But such expressions are usually avoided nowadays, because they obscure the crucial difference between public international law and other bodies of transnational law such as private international law, Admiralty law and the law merchant. The upsurge of legislative activity throughout the western world during the nineteenth century made it necessary to distinguish, probably for the first time, between those rules of the *ius gentium* which could be altered unilaterally without provoking protests from other States and those which could not. If a State passed a law claiming a territorial sea of more than three miles, it was denounced as a law-breaker by other States. If it altered its rules of private international law, for instance by substituting the *lex patriae* for the *lex domicilii* as the personal law,⁹ no such

¹ Rheinstein, *University of Chicago Law Review*, 22 (1955), pp. 775, 802-17.

² See above, p. 172 and below, pp. 219, 224, 226-7. In *The Halley* (1867), 2 Adm. and Ecc. 3, at pp. 5-6, Sir Robert Phillimore distinguished between the '*ius inter gentes*, or public international law, and . . . the *ius gentium*, or private international law'.

³ *The Two Friends* (1799), 1 C. Rob. 271, 279; *The Bee* (1836), 3 F. Cas. 41, 43; *Cammell v. Sewell* (1860), 5 H. and N. 727, 744.

⁴ *Scrimshire v. Scrimshire* (1752), 2 Hag. Con. 395, 420. See also *Banco Nacional de Cuba v. Sabbatino* (1964), 376 U.S. 398, 455, per White, J., dissenting, and Nussbaum, *A Concise History of the Law of Nations* (1953), p. 28.

⁵ Batiffol, *Aspects philosophiques du droit international privé* (1956), pp. 144 et seq.

⁶ *Sobonis v. Steam Tanker National Defender* (1969), 298 F. Supp. 631, 635; *Usatore v. The Victoria* (1949), *Annual Digest*, 1949, p. 150.

⁷ (1933), *ibid.*, 1933-34, p. 323.

⁸ (1966), I.L.R., vol. 39, pp. 61, 115 et seq.

⁹ This happened in many continental countries during the nineteenth century. Before the French Revolution all western European countries applied the *lex domicilii*, which explains why this practice was described as belonging to the *ius gentium*.

reaction occurred. In *The Johan and Siegmund* Sir William Scott admitted that the old rule of Admiralty law concerning the right of possession over ships, laid down by 'the general maritime law of nations', had been 'variously modified by the municipal law of different countries'; but he did not suggest that those countries had done anything improper in departing from the old rule.¹

Other differences between public international law and other bodies of transnational law also became accepted during the nineteenth century.² Public international law, unlike the other rules, applied by and large only to relations between States, not to relations between individuals. (It is true that during the twentieth century this distinction has become a little blurred, but during the nineteenth century it was clear.) It also came to be realized that public international law had different sources; for instance, the practice of States which produced customary international law was different from the practice of merchants which produced the law merchant.

In cases dealing with the recognition of foreign laws, judgments and acts of State, references to the *ius gentium*, the law of nations or even international law should therefore be treated with caution. One cannot assume, without further inquiry, that public international law is meant. Indeed, there is probably a presumption that it is not meant, unless there is something else in the context (e.g. an express reference to *public* international law, or an allusion to the rights or sovereignty of other States being infringed, etc.) which suggests otherwise.

Comity

The term 'comity' was first used by the Netherlands writers on private international law, Paul Voet (1619-77), Ulric Huber (1636-94) and John Voet (1647-1714). The Voets used it to mean 'courtesy'. Huber, on the other hand, seems at times to have regarded comity as being part of the *ius gentium*,³ but, as we have seen, *ius gentium* in the seventeenth century did not necessarily mean public international law.⁴

'Comity' is translated into French as *courtoisie internationale*, into Italian as *cortesia internazionale*, into German as *Völkercourtoisie*—terms which

¹ (1810), Edw. Adm. 242. See also below, p. 227. Parry, *Nationality and Citizenship Laws of the Commonwealth* (1957), pp. 22 et seq., suggests that originally there was a uniform nationality law throughout Europe which predated modern international law; international law did not oblige States to keep to this uniform law, and at a later date States changed it without breaking international law.

² Kaplan and Katzenbach, *The Political Foundations of International Law* (1961), pp. 66-7.

³ Yntema, *Michigan Law Review*, 65 (1966), p. 1; Lipstein, [1972-B] *Cambridge Law Journal*, pp. 69-70. English courts at one time also described rules of private international law as arising *ex comitate et iure gentium*: *Robinson v. Bland* (1760), 1 Wm. Bl. 234, 258-9; *Ruding v. Smith* (1821), 2 Hag. Con. 371, 386. See also *Bank of Augusta v. Earle* (1839), 38 U.S. 519, 589.

⁴ See above, pp. 212-14.

clearly do not denote any legal obligation.¹ In English-speaking countries, however, 'comity' is much more ambiguous. British and American judges often speak of a breach of comity in circumstances where reference to international law would be more appropriate; thus it is said to be contrary to comity to break a treaty² or to prosecute a foreigner for crimes committed abroad,³ and sovereign and diplomatic immunities have been described as resting on comity.⁴ Sir Hersch Lauterpacht ascribed this practice to Austinian doubts as to whether international law was really law; the judges talked about comity instead of international law, in order to avoid recognizing international law as law.⁵ There is, however, another possible explanation. Many rules of international law are based on a desire to act courteously towards other States,⁶ and courtesy does require that the legal rights of other States should be respected;⁷ courtesy and international law lend reciprocal support to one another, and it is therefore likely that a breach of international law will be a breach of courtesy (or comity), without suggesting that international law and comity are synonymous. *Khedivial Line, S.A.E. v. Seafarers' International Union* is exceptional in identifying comity with reciprocity of a type which may sometimes be required by international law.⁸

But in most cases comity has been treated as something different from international law.⁹ Thus it has been said that extradition of criminals, in the absence of a treaty, is a matter of comity, not of right;¹⁰ that exclusion of foreign vessels from a port would be a breach of comity, but not of international law;¹¹ that coastal States have a legal right to try crimes committed on board foreign ships in their ports, but often refrain from exercising it as a matter of comity;¹² and that the exemption of fishing vessels from seizure by enemy warships is a rule of comity and not of international law.¹³

¹ This is confirmed by the State practice of France and Italy: Kiss, *op. cit.* (above, p. 147 n. 6), vol. 1, pp. 43-4; *La prassi italiana di diritto internazionale*, 1st Series, vol. 1, p. 5.

² *Collico Dealings Ltd. v. Inland Revenue Commissioners*, [1962] A.C. 1.

³ *Joyce v. D.P.P.*, [1946] A.C. 347, 352.

⁴ *The Parlement Belge* (1880), L.R. 5 P.D. 197, 214, 217; *El Neptuno* (1938), 62 Lloyds List Law Reports 7, 9; *R. v. A.B.*, [1941] 1 K.B. 454, 457. But see below, p. 216 at n. 1.

⁵ *International Law* (collected papers ed. by E. Lauterpacht, 1970), vol. 1, pp. 44-6.

⁶ Hackworth, vol. 4, p. 460 ('comity is the basis of much of international law'); *Sison v. Board of Accountancy* (1949), I.L.R., 18 (1951), pp. 14, 15-16.

⁷ This may be what Cohen L.J. meant in *Krajina v. Tass Agency*, [1949] 2 All E.R. 274, 280, when he spoke of 'the principles of comity established by international law'.

⁸ (1960), I.L.R., vol. 31, pp. 137, 140. See also the equivocal opinion of the Attorney-General Knox (1902), reported in D. R. Deener, *The United States Attorneys-General and International Law* (1957), p. 284.

⁹ See also below, pp. 218, 233.
¹⁰ Phillimore, *Commentaries upon International Law* (3rd ed., 1879), vol. 1, p. 522; *State v. Brewster* (1835), 7 Vt. 118.

¹¹ McNair, *International Law Opinions* (1956), vol. 1, p. 343.

¹² C. J. Colombos, *The International Law of the Sea* (6th ed., 1967), pp. 324-7; P. C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), p. 145.

¹³ *The Young Jacob and Johanna* (1798), 1 C. Rob. 20; *The Paquete Habana* (1900), 175 U.S. 677, 693-4.

In *The Cristina* Lord Wright said that sovereign immunity 'is sometimes said to flow from international comity or courtesy, but may now more properly be regarded as a rule of international law'.¹ The United States State Department clearly regards comity as something different from international law.² Some judges have identified comity with courtesy,³ or described it as 'a blend of courtesy and expedience'.⁴ A large number of cases hold that comity is something more than courtesy, but nevertheless deny⁵ (or at least refrain from stating)⁶ that it is synonymous with a duty imposed by international law.

Given the ambiguity of the word 'comity', one cannot say that the word is misused when it is used as a synonym for international law. However, it is not often used in this sense, and there must therefore be a strong presumption (unless there is clear evidence that a reference to international law is intended) that judicial statements that recognition of foreign laws, judgments and acts of State is required by comity do not mean that it is required by international law.

2. APPLICATION OF FOREIGN LAW

International law sometimes incorporates rules of municipal law. For instance, a treaty between States may provide that some question related to the subject-matter of the treaty shall be governed by some system of municipal law. In a sense, this happens whenever a treaty refers to national currencies; United States law alone can determine the meaning of the words 'United States dollars'. A party to the treaty cannot evade its obligations under the treaty by refusing to recognize United States laws defining the value of United States dollars.

Similar considerations apply to nationality laws. Under both customary law and treaties a State can often claim rights on behalf of its nationals. Sometimes a treaty lays down its own definition of nationality; for instance, Article 78 (9) (b) of the Italian Peace Treaty, 1947, provides that 'the term

¹ [1938] A.C. 485, 502.

² Hackworth, vol. 2, pp. 314-15; *American Journal of International Law*, 65 (1971), p. 601. Cf. the equivocal opinion of Attorney-General Knox (1902), reported in D. R. Deener, *The United States Attorneys-General and International Law* (1957), p. 284.

³ *El Neptuno* (1938), 62 Lloyd's List Law Reports 7, 9; *Olivier v. Townes*, 2 Mart. (N.S.) 93.

⁴ *Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.* (1969), *American Journal of International Law*, 65 (1971), pp. 610-11.

⁵ *Johnston v. Compagnie Générale Transatlantique* (1926), 242 N.Y. 381, 387. Despite certain ambiguities, *Hilton v. Guyot* (1895), 159 U.S. 113, 163-4, 166, probably points the same way. (*Hilton v. Guyot* has been cited with approval in a number of subsequent cases, such as *Anderson v. N.V. Transandine Handelsmaatschappij* (1941), *Annual Digest*, 1941-42, pp. 10, 13, and *Sison v. Board of Accountancy* (1949), I.L.R., 18 (1951), pp. 14-16.) See also Hall, *A Treatise on the Foreign Powers and Jurisdiction of the British Crown* (1894), p. 102.

⁶ *Mast Foos & Co. v. Stover Manufacturing Co.* (1900), 177 U.S. 485, 488; *R.S.F.S.R. v. Cibrario* (1923), 235 N.Y. 255.

"United Nations nationals" also includes all individuals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy'. However, in the absence of such special clauses, the general rule is that the question whether an individual has the nationality of State *A* is answered by looking at the law of State *A*. To be sure, there are exceptions to this general rule—double nationality gives rise to problems, the nationality law itself may be contrary to international law, there is no duty to recognize the loss of enemy nationality in wartime, etc.—but these are exceptions to the general rule and not negations of it. As a general rule, a State cannot evade its duties with regard to the nationals of other States by refusing to recognize the foreign laws defining their nationality.

Apart from cases where a rule of municipal law is incorporated into international law, are States under any duty to apply the laws of other States? In European countries the courts of one State have applied the laws of other States for centuries; books on private international law devote hundreds of pages to expounding rules governing the application of foreign laws.¹ But is this practice required by public international law?

Doctrinal opinion

The statutist writers did not discuss the question whether public international law imposed a duty on States to apply foreign laws. They sought to deduce rules of private international law, not from public international law, but from Roman law. (It is true that Roman law influenced the development of public international law, but this merely means that private international law and public international law share the same ancestry to some extent, not that public international law lays down rules of private international law.) In any case, the conflicts of laws which were studied by the statutists were usually inter-provincial conflicts and not international conflicts;² the Emperor and the Church had overriding authority over the city-states of medieval Italy, and the King of France had overriding authority over the diverse customs of French provinces in the sixteenth century.

Paul Voet (1619–77) and Ulric Huber (1636–94) were the first authors to answer the question: why do courts apply foreign law? They answered the question by producing the famous theory of comity.³

¹ Or, according to some writers on private international law, the enforcement of rights created under foreign law, or the creation and enforcement of a right under the *lex fori* which resembles a right under foreign law. The acquired rights theory and the local law theory are concerned with analysing *what* a court does; the present study is concerned with analysing *why* the court does it. These two questions are entirely separate from one another. References in the present chapter to the application of foreign laws are not intended to indicate any approval or disapproval for the vested rights theory or the local law theory, and supporters of either of these theories are at liberty to rephrase such references accordingly.

² Nussbaum, *Columbia Law Review*, 42 (1942), pp. 189–90.

³ See above, p. 214.

Huber exercised great influence in English-speaking countries, where his theories of vested rights and of comity long enjoyed popularity. The vested rights theory throws no clear light on the question which concerns us; some supporters of the vested rights theory believed that respect for foreign vested rights was required by public international law,¹ but others did not.² But, whatever the meaning which Huber may have attributed to 'comity',³ his English-speaking followers clearly interpreted it as implying that public international law imposed no duties to apply foreign law.⁴

Joseph Story is a good example. In his *Commentaries on the Conflict of Laws*, first published in 1834, he wrote:

The laws of one country can have no intrinsic force, *proprio vigore*, except within the territorial limits and jurisdiction of that country. . . . No other nation, or its subjects, are bound to yield the slightest obedience to those laws (s. 7).

A State may prohibit the operation of all foreign laws and the rights growing out of them within its own territories. It may prohibit some foreign laws, and it may admit the operation of others (s. 23).

Whatever force and obligation the laws of one country have in another, depends solely upon the laws and municipal regulations of the latter, that is to say upon its own jurisprudence and polity, and upon its own express or tacit consent (s. 23).

The application of foreign laws is a matter of comity, which he identified with mutual convenience, not with legal obligation (s. 33).

Story's views, which were echoed by Wheaton,⁵ still remain more or less unchallenged in English-speaking countries.⁶ Thus Dicey says:

Many attempts have been made to link up these two departments of law [public and private international law], . . . but all these attempts have failed.⁷

A similar negative attitude is taken in Canada.⁸ However, since this question lies on the borderland between public and private international law, it is often avoided by writers on either subject; in the United States,

¹ See the authors cited by Nussbaum, loc. cit. (above, p. 217 n. 2), pp. 198-9.

² A. V. Dicey, *Conflict of Laws* (2nd ed., 1908), pp. 3, 11; *Gray v. Gray* (1934), 87 N.H. 82, 86.

³ See above, p. 214.

⁴ The seventeenth- and eighteenth-century French writers who also adopted Huber's comity theory likewise interpreted it in this sense: P. Lerebours-Pigeonnière, *Droit international privé* (8th ed., by Y. Loussouarn, 1962), p. 325.

⁵ H. Wheaton, *Elements of International Law* (1904), pp. 129-31.

⁶ The main exception is E. C. Stowell, *International Law* (1931), pp. 285 et seq. Fachiri, this *Year Book*, 12 (1930), pp. 95, 97-8, comes close to saying that international law imposes a duty to apply foreign law, but does not quite say so.

In 1883 Lorimer argued that international law imposed a duty to apply foreign laws, but as a Scotsman he was probably less influenced by Story than by writers in civil law countries like Germany and Italy. In any case, most Scots writers and judges do not share Lorimer's opinion. See, generally, Anton, *Private International Law* (1967), p. 1. Lorimer argued that recognition of a foreign State implies necessarily recognition of the foreign State's laws. For refutation of this type of argument see Lipstein, *Transactions of the Grotius Society*, 35 (1949), p. 147.

⁷ Dicey and Morris on the *Conflict of Laws* (8th ed., 1967), p. 8.

⁸ Castel, *Conflict of Laws* (1968), p. 36.

particularly, the preoccupation of private international lawyers with conflicts between the laws of the member-states of the federation makes them disinclined to consider questions of public international law.

On the continent of Europe events took a different course, at least for a time.

Savigny, in volume 8 of his *System des heutigen römischen Rechts* (1849), based private international law on a *völkerrechtliche Gemeinschaft* of nations having intercourse with one another (s. 348). The usual meaning of *Völkerrecht* is 'public international law', but this phrase is the only passage in the whole of his book which could be interpreted as implying that rules of private international law are derived from public international law. It is much more likely that he was thinking of the 'law of nations' in a sense similar to its original Latin meaning, because he considered that similarities between the cultures and laws of different States were the logical basis for uniformity of rules of private international law. (The corollary to this, of course, is that major differences between systems of municipal law are likely to be reflected in differences in rules of private international law—a consequence which was pointed out by Wächter and which was to be forcefully emphasized by Bartin.) In any case, Savigny said expressly that 'no State can require the recognition of its law beyond its bounds' (s. 348).

Mancini, in his inaugural lecture at Turin in 1851, advocated the principle of nationality as the basis of international law; but in this lecture he was concerned with public international law and did not refer to private international law. His views on private international law, and on its relation to public international law, were much more cautious. An article which he published in 1874 contains passages which might be interpreted as meaning that public international law required the application of foreign law (particularly of the *lex patriae*);¹ but he admitted that rules of private international law differed from State to State, and his main concern was to advocate treaties unifying such rules for the future; he made little attempt to argue that existing public international law laid down rules about the application of foreign law.

Mancini's followers, however, did argue that public international law imposed a duty on States to apply foreign laws.² In particular, they maintained that public international law required the application of the *lex patriae* as the personal law.³ They seemed oblivious of the fact that at least

¹ *Journal de droit international*, 1 (1874), pp. 221, 285, and especially p. 298.

² Nussbaum, *Columbia Law Review*, 42 (1942), p. 189; Maury, *Recueil des cours*, 57 (1936), p. 329; Ago, *ibid.* 58 (1936), pp. 247, 252 et seq.; Pacchioni, *Diritto civile italiano* (1935), Part 1, vol. 2, pp. 53 et seq.; Lipstein, *Transactions of the Grotius Society*, 27 (1942), pp. 142-3, 146-8.

³ This was not the only choice of law rule which they tried to base on public international law. Thus Zitelmann, *Internationales Privatrecht* (1897), contended that public international law required the application of the *lex patriae* to contracts between the nationals of another

half the countries in the world applied the law of an individual's domicile or religion instead; that the application of the *lex patriae* as the personal law in certain European countries was a recent innovation; and that even international tribunals had often applied the law of domicile as the law governing succession.¹ Virtually no one nowadays believes that application of the *lex patriae* is required by public international law; the disputes between French private international lawyers over the question whether France should adopt the *lex domicilii* or retain the *lex patriae* are conducted without reference to public international law. Indeed, the view that application of *any* foreign law is required by public international law is seldom held nowadays.² Even in its heyday this view exercised little influence on courts; the *Reichsgericht* declared in its judgment of 12 October 1903 that 'the rules of private international law are not propositions of the law of nations, but integral components of the private law in question'.³

Conflicting foreign laws

Supposing, for the sake of argument, that international law did require States to apply foreign laws, how would one deal with a situation where different States had enacted conflicting laws to govern the same transaction? Theoretically, one might apply the law of the State which had the closest connection with the facts of the *particular* case, as in *Babcock v. Jackson*;⁴ but this approach is still a relatively novel and unusual one, and so cannot be regarded as required by public international law. Alternatively, one might apply the law of the State which had the greatest interest in governing the situation, as suggested by Antoine Pillet,⁵ Brainerd Currie⁶

State, the *lex situs* to property and the *lex loci delicti commissi* to torts. See also below, p. 222. On the *lex situs*, cf. below, pp. 224-6, on the *lex loci delicti commissi*, cf. above p. 186.

¹ *Stevenson* claim (1903). R.I.A.A., vol. 9, pp. 494, 510; *Brignone* claim (1903), *ibid.*, vol. 10, p. 542; *Mezger* claim (1903), *ibid.*, p. 417. Compare Lipstein, *Transactions of the Grotius Society*, 27 (1942), pp. 173-4, and *ibid.* 29 (1943), p. 75.

² But a few writers do still hold it; see Evrigenis, *Recueil des cours*, 118 (1966), pp. 319, 419-26. It is true that many writers believe that a State may not apply its own law to cases which have no connection with it (see above, pp. 181 et seq.), but that does not mean that the State is obliged to apply foreign law to such cases; its courts could equally well refrain from trying such cases, since the rules of public international law concerning denial of justice do not go so far as to require a court to try cases which have no connection with the State of the forum.

³ 55 E. 349. But cf. *Kingdom of Belgium v. E.M.F.C.H.*, where the Hague Court of Appeal referred to '... the accepted principle of international law ... under which States ought to assist each other in securing extra-territorial effect to their legislation which concerns their subjects ...' (I.L.R., 20 (1953), pp. 26, 28); if 'subjects' means 'nationals', this dictum becomes extremely dubious, particularly since the action was in quasi-contract, where nationality is not an appropriate connecting factor. For further criticism of this case, see Mann, *loc. cit.* (above, p. 147 n. 1), pp. 144-5.

⁴ (1963), 12 N.Y. 2d 473.

⁵ Pillet set out his views in a long article serialized in the *Journal de droit international* during 1894-6. Unlike Currie and Briggs, he sought to base his theory on the requirements of public international law.

⁶ Morris, *The Conflict of Laws* (1971), pp. 530-5.

and Briggs.¹ But this is clearly not required by public international law, either, because it is precisely in those spheres where a State has the greatest interest in having its law enforced by foreign courts (criminal law, revenue law and 'public' law generally) that its law is least likely to be enforced.² Besides, how could a third State reconcile the equal but opposite interests of two foreign States? (For instance, a State of emigration has an interest in having its law applied to its absentee *nationals*, whereas a State of immigration has an equal interest in having its law applied to its new *domiciliaries*.)

If foreign laws were applied out of a sense of duty owed to foreign States, one would expect to find that courts would begin their inquiry by looking all round the world to see if any State's legislation applied to the facts of the case, and that they would then try to reconcile the rival claims of different States by applying the law of the State which had the greater interest in having its law applied. This is not what happens in practice. A court applies the law indicated by the choice of law rules of the forum. The fact that other foreign States wish to have their laws applied is disregarded. The fact that the State whose law is indicated by the choice of law rules of the forum does not wish to have its law applied is also usually disregarded; *renvoi* is the exception, not the rule.

Probably no simple answer can be given to the question why courts apply foreign laws; the reasons probably vary from country to country, from century to century, and from context to context.³ But one factor which is more constant than any other is a desire to do that which is most just and appropriate for the individuals who appear before the court. That is why the law of an enemy State is applied in wartime. The application of foreign law is designed to benefit individuals, not to benefit the foreign State (that is probably why revenue laws and other 'public' laws are not enforced abroad). Some people might imagine that a State might be entitled to protest if its nationals were denied the benefits of its law in foreign courts; but, quite apart from the fact that such protests are almost never made,⁴ the application of his national law may not necessarily be in the individual's interests. For instance, if a Frenchman breaks a contract with an Englishman, and if French law awards higher damages than English law, it is in

¹ *International and Comparative Law Quarterly*, 4 (1955), p. 329.

² Mann, *Transactions of the Grotius Society*, 40 (1955), p. 25; van Hecke, *Recueil des cours*, 126 (1969), pp. 409, 484-98.

³ In countries where the law has been codified, rules of private international law are often deduced from the provisions of the code defining the scope of application of the *lex fori*. For instance, Article 3 of the French Civil Code provides that the status and capacity of Frenchmen are governed by French law; from this the French courts inferred that the status and capacity of foreign nationals should be governed by the foreign *lex patriae*. This translation of unilateral rules into bilateral rules can also be seen in the context of the recognition of foreign judgments; see below, p. 237.

⁴ See below, pp. 228-30.

the Frenchman's interests to have English law applied. Conversely, English courts apply French law to determine the formal validity of marriages celebrated in France, even though the parties concerned are English; application of French law is not an act of deference to the French State (it is inconceivable that France would have *locus standi* to protest on behalf of an English litigant), but is simply believed to be most just and appropriate for the individuals concerned.

One cannot argue that public international law requires the application of foreign law without also arguing that public international law lays down choice of law rules, because otherwise there is no satisfactory way of resolving conflicts between competing systems of foreign law. But attempts to discover choice of law rules laid down by public international law have not been successful.¹ The attempt to prove that application of the *lex patriae* is required by public international law has already been mentioned.² Lipstein gives two other examples of choice of law rules which are often supposed to be required by public international law—the rule that form is governed by the *lex loci actus*, and the rule that the *lex rei sitae* must be applied to immovables and that rights acquired under a previous *lex rei sitae* must be recognized and respected.³

¹ Article 1 of the Statutes of the Hague Conference on Private International Law (adopted after the Second World War) says that the conference 'aims at the progressive unification of rules of private international law', and unification would not be necessary if uniformity already existed. Even the earlier Hague Conventions state in their preambles that the parties were: *désirant établir des règles communes concernant plusieurs matières de droit international privé*, or . . . *des dispositions communes pour régler les conflits de lois*, which implies that common rules did not already exist.

It is true that many rules of public international law are unsettled, but there is all the difference in the world between, say, the Geneva Conference on the Law of the Sea in 1958, where the 'three-mile' States and the 'twelve-mile' States accused one another of breaking the law, and a conference on private international law, where the *lex patriae* States and the *lex domicilii* States did not denounce one another as law breakers. No one imagines that public international law resolves conflicts of laws in the way that it is supposed to resolve the question of the width of the territorial sea.

² See above, pp. 219–20.

³ *Transactions of the Grotius Society*, 27 (1942), pp. 142, 146. These are respectively the fifth and fourth of what Lipstein describes as the tenets of the internationalist school. The first three tenets are as follows:

1. Every State must have a system of private international law.
2. States may not exclude the application of foreign law altogether.
3. No State may impose its own rules as to status upon persons who are merely temporary residents.

The third tenet is discussed above, pp. 186–7. As for the first and second tenets, which are echoed in s. 9 of the *Restatement*, they are too vague to be proved or disproved. Besides, surely each case where a court refuses to apply foreign law must be considered in isolation. Suppose that States *A* and *B* refuse to apply foreign law in tort cases; is it logical to argue that *A*'s refusal to apply foreign tort law is in accordance with public international law but that *B*'s refusal to apply foreign tort law is not, because *B*, unlike *A*, also excludes the application of foreign law in non-tort cases? How can it be suggested that the plaintiffs in the tort actions in *B* have suffered a greater denial of justice than the plaintiffs in the tort actions in *A*? It is not enough to say that a State may not exclude the application of foreign law altogether; this is meaningless unless a list is given of the circumstances in which non-application of foreign law is prohibited.

In *Recueil des cours*, 135 (1972), pp. 97, 169, Lipstein qualifies the second tenet by adding

It is impossible to hold that *locus regit actum* is a mandatory rule; compliance with the forms laid down by another system of law is often treated as an alternative. For instance, German private international law requires observance either of the *lex loci* or of the *lex causae*;¹ Italian private international law also adds the *lex patriae*, if all the parties have the same nationality.² In the Soviet Union compliance with the *lex fori* is an alternative to compliance with the *lex loci*.³ In the case of contracts, compliance with the law governing the essential validity of the contract is accepted as an alternative to compliance with the *lex loci* in most countries;⁴ some countries add the personal law of the parties or the *lex fori* as a third alternative.⁵ In the case of wills, the personal law and/or the *lex situs* are treated as alternatives to the *lex loci* in many countries; in some countries even the *lex fori* is admitted as an alternative.⁶ In the case of marriages celebrated outside the State of the forum, compliance with the personal law of the parties is often treated as an alternative to compliance with the *lex loci*.⁷ In many countries the form of a cheque need not be in accordance with the law of the place of signature, if it is in accordance with the law of the place of payment.⁸

Sometimes compliance with the forms of the *lex loci* is not enough to give an act formal validity. The formal validity of a transfer of property is often governed by the *lex situs*.⁹ The formal validity of a will is (or was) often governed by the law governing the succession.¹⁰ Many Latin American countries require observance of the forms of the *lex fori* if a contract is to be performed (or enforced, in some cases) in the State of the forum;¹¹ in

that a State may exclude foreign law on grounds of public policy, and rephrases the fourth tenet as follows: 'Immovables are governed by the *lex situs*, and rights in *movables* acquired in virtue of a previous *lex situs* must be respected' (*italics added*).

¹ E.G.B.G.B., Art. 11 (1). The rule is the same in Japan, Poland and Portugal.

² Introduction to the *Civil Code*, Art. 26. The rule is the same in Greece: T.M.C. Asser Instituut, *Statutory Private International Law* (1971), p. 138.

³ *Ibid.*, pp. 304-5.

⁴ Wolff, *Private International Law* (2nd ed., 1950), p. 446; Batiffol, *Droit international privé* (5th ed., 1971), vol. 2, p. 254; Rabel, *The Conflict of Laws*, vol. 2 (2nd ed., 1960), Chapter 31; *Restatement, Second, Conflict of Laws* (1971), s. 199.

⁵ Rabel, *op. cit.* (in the preceding note).

⁶ Rabel, *Vanderbilt Law Review*, 6 (1953), p. 533; *International and Comparative Law Quarterly*, 15 (1966), pp. 457, 468; T.M.C. Asser Instituut, *Statutory Private International Law* (1971), pp. 113, 250. See also the Hague Convention on the Formal Validity of Wills, 1961.

⁷ Rabel, *The Conflict of Laws*, vol. 1 (2nd ed., 1958), pp. 228-9; T.M.C. Asser Instituut, *op. cit.* (in the preceding note), p. 291; *International and Comparative Law Quarterly*, 15 (1966), pp. 457, 464.

⁸ Geneva Convention on Cheques, 1931. The law in the Soviet Union is the same.

⁹ Wolff, *Private International Law* (2nd ed., 1950), p. 524; *Restatement, Second, Conflict of Laws* (1971), vol. 2, pp. 13, 72-3, 166; Rabel, *The Conflict of Laws*, vol. 4 (1st ed., 1958), pp. 46-8. See also the sources cited above, n. 2 on this page.

¹⁰ Treaty of Montevideo, Art. 44; *Selected Readings on the Conflict of Laws* (ed. Culp, 1956), pp. 992-3; *Restatement, Second, Conflict of Laws*, vol. 2, pp. 48-50, 121-2; Cheshire (and North), *Private International Law* (8th ed., 1970), p. 590.

¹¹ Rabel, *The Conflict of Laws*, vol. 2 (2nd ed., 1960), Chapter 31.

the Soviet Union the form of foreign trade transactions entered into by Soviet organizations must comply with Soviet law.¹ Common law countries make no distinction between the formal and essential validity of many transactions, such as contracts and transfers of property; formal validity is therefore governed by the *lex causae*.² Many other countries, while paying lip-service to the idea of formal validity's being governed by the *lex loci*, evade it in practice by questionable classifications; for instance, they say that their nationals have no capacity to make a holograph will abroad,³ or to go through a civil form of marriage abroad.⁴ Reference should also be made to the tendency of courts in common law countries to treat the Statute of Frauds (which would be regarded in most countries as regulating the form of contracts) as a matter of procedure, governed by the *lex fori*.⁵

As for the other rule mentioned by Lipstein, it is true that the *lex rei sitae* is applied to immovables in the vast majority of cases. But there is no evidence that this practice reflects any conviction that the application of the *lex rei sitae* is required by public international law;⁶ rather, it would seem to be based on a realization of the futility of following any other course, since a judgment applying any other law would not be applied in the State of the *situs*. Even so, the equitable doctrine of jurisdiction *in personam* can be used to make rights derived from the *lex fori* prevail over rights derived from the *lex rei sitae*;⁷ and in cases of universal succession (death, bankruptcy, etc.) the *lex rei sitae* will not necessarily be applied (in Italy, Greece, Czechoslovakia, Poland, Portugal, Spain and a number of Muslim and African countries succession to immovables is governed by the personal law).

At one time movables were usually governed by the owner's personal law, and Story went so far as to say that this was a rule of the *ius gentium*; but he clearly meant *ius gentium* in the Roman sense, because he added that the State of the *situs* would be entitled to apply its own law, although he regarded this as undesirable.⁸ Nowadays, of course, the *lex situs* is generally applied,⁹ and some authorities even suggest that application of the *lex situs*

¹ *Principles of Civil Legislation of the Soviet Union and Union Republics* (1961), s. 125.

² *Hall v. Cordell* (1891), 142 U.S. 116; Cheshire (and North), *Private International Law* (8th ed., 1970), pp. 219-20, 483-6 and 513.

³ Wolff, *Private International Law* (2nd ed., 1950), p. 589 (Netherlands, Portugal, Uruguay and Greece).

⁴ This rule used to exist in most countries of eastern and southern Europe, and still exists in Greece, Egypt, Malta, Cyprus, Yugoslavia, Iran and (to some extent) Israel and Spain. See Rabel, *The Conflict of Laws*, vol. 1 (2nd ed., 1958), pp. 230-3; Katičić, *Recueil des cours*, 131 (1970), pp. 393, 430.

⁵ *Leroux v. Brown* (1852), 12 C.B. 801.

⁶ Apart from ambiguous dicta in some municipal judgments; see below, p. 226.

⁷ See above, pp. 174, 210-11.

⁸ *Commentaries on the Conflict of Laws*, s. 380 and 390.

⁹ Rabel, *The Conflict of Laws*, vol. 4 (1st ed., 1958), pp. 30 et seq. In Spain the *lex patriae* of the owner is still applied (Art. 10 (1) of the Civil Code).

is required by public international law.¹ It is advisable to be clear what exactly is in issue. Clearly a State is not entitled to invoke the fact that property was acquired abroad as a pretext for expropriating that property without compensation when it is brought into the State's territory; but what is wrong here is not the application of the *lex fori* in place of the *lex situs*, but the confiscatory *content* of the *lex fori*.² One cannot invoke this rule as an argument for holding that a State is under a duty to apply foreign law in private law disputes between individuals, where there is no question of confiscation by the State of the forum.

The *lex situs* is often not applied to goods in transit, or in cases of universal succession (death, marriage, bankruptcy, etc.). These are justifiable exceptions to the general principle that the *lex situs* should be applied, and do not really undermine the principle. But other cases where the *lex situs* is not applied cannot be explained in this way. In *Simpson v. Fogo*, Wood V.-C. was very indignant about a Louisiana judgment which refused to recognize English mortgagees' rights of ownership over a ship on the sole ground that no such rights existed in Louisiana law³—in other words, the Louisiana court refused to apply the *lex situs* because it was different from Louisiana law. But, on similar facts, courts in some other states of the United States⁴ and in France⁵ have decided cases in the same way as the Louisiana court decided this case, and there is no record of other States' protesting against such judgments.

But even if practice were uniform in applying the *lex situs*, what would that prove? Application of the *lex situs* seems to be based on commercial convenience, not on any *opinio iuris* that application of the *lex situs* is required by public international law. Nor can one blur the issue by saying that application of the *lex situs* is a general principle of law. True, it is a general principle of law in the sense that it is so widespread in municipal law that an international tribunal, if it ever had to decide which law governed title to property, would be justified in borrowing the rule from municipal law and applying it.⁶ But that does not mean that a State which did not apply the rule would be breaking public international law.

¹ Dicta in *Inglis v. Robertson*, [1898] A.C. 616, 625, per Lord Watson, in *État Russe v. La Ropit* (1928), Kiss, op. cit. (above, p. 147 n. 6), vol. 2, p. 173, and in *Banco Nacional de Cuba v. Sabbatino* (1964), 376 U.S. 398, 454-5, per Justice White, dissenting, point in this direction.

² See above, pp. 181-90. Similarly a State which acquires territory is not allowed to confiscate property within that territory acquired under the law of the predecessor State; this is presumably the meaning of Lipstein's reference to the previous *lex rei sitae* in the case of immovables, above, p. 222.

³ (1863), 32 L.J. Ch. 249, 254-5.

⁴ Rabel, *The Conflict of Laws*, vol. 4 (1st ed., 1958), p. 89.

⁵ Cass. req., 19 March 1872, Sirey 1872 I. 238.

⁶ This has often been done; but with regard to questions other than the law governing title to property, the choice of law rules applied by international tribunals have been conflicting and inconsistent. See Niboyet, *Recueil des cours*, 40 (1932), pp. 157, 226 et seq.; Lipstein, *Transactions of the Grotius Society*, 27 (1941), p. 142, and *ibid.* 29 (1943), p. 51.

Extinctive prescription is a general principle of law in the sense that it exists in most municipal systems and has been borrowed and applied by international tribunals; but is there any reason to suppose that a State would break public international law if it made no provision for extinctive prescription in its own municipal law?¹

Municipal judgments and international choice of law rules

A number of judgments by English and American courts,² mainly in older cases, say that certain choice of law rules are laid down by the *ius gentium* or by international law. In *Robinson v. Bland* Lord Mansfield said that 'the general rule, established *ex comitate et iure gentium*', was that contracts were normally governed by the law of the place where they were made.³ In *Scrimshire v. Scrimshire* it was said to be a rule of the *ius gentium* that the form of a marriage was governed by the *lex loci*.⁴ The application of the *lex rei sitae* to immovables has also been said to be a rule of the *ius gentium*.⁵

It seems fairly clear, however, that *ius gentium* was used in its Roman sense, not in the sense of public international law.⁶ The few references to 'international law' in the more recent cases must be taken either to represent a mistranslation of the words *ius gentium* which the judges had read in the older cases, or to refer to the *private* international law of the forum. Some of the cases attach the label of international law to rules which are uniquely English (or American) and which do not exist in other countries. For instance, in *Ennis v. Smith* the United States Supreme Court said that it was a rule of the *ius gentium* that movables should be disturbed (sc.

¹ Verzijl, *International Law in Historical Perspective* (1968), vol. 1, pp. 60-1.

² Similar dicta occasionally appear also in judgments from other countries. For instance, in *The Windhuk* (1940), *Annual Digest*, 1938-40, p. 169, a Brazilian court said that international law determined which law should govern the question whether a debt was privileged (i.e. secured) on a ship. But it is likely that private international law was meant; the court said that authors were divided between the claims of *lex situs* (the law of the State of the port) and of the law of the flag State. See also above, p. 225.

In *Anita v. Treves* (1930), *Annual Digest*, 1929-30, p. 106, the Turin Court of Appeal said that 'on account of a generally followed principle of international law, relations of private law, including questions of civil status, which take place on board merchant vessels are governed by the law of their own State', and not by the law of the foreign port where the vessel happened to be. But this rule is not universally accepted: *MacKinnon v. Iberia Shipping Co.*, I.L.R., 21 (1954), p. 126; Rabel, *The Conflict of Laws*, vol. 2 (1st ed., 1947), pp. 342-5.

³ (1760), 1 Wm. Bl. 234, 258-9. See also *James v. Allen* (1786), 1 Dallas 188 (Pennsylvania) and *Arnott v. Redfern* (1825), 172 E.R. 40, 41.

⁴ (1752), 2 Hag. Con. 395. See also *Ruding v. Smith* (1821), 2 Hag. Con. 371, 386, and *Berthiaume v. Dastous*, [1930] A.C. 79, 83. Cf. *Maksymec v. Maksymec* (1956), *Modern Law Review*, 20 (1957), pp. 641-2.

⁵ *Davis v. Headley* (1871), 22 N.J. Eq. 115. See also the judgment of the United States consular court, reported in Hackworth, vol. 2, pp. 545-6.

⁶ Thus in *Scrimshire v. Scrimshire* (1752), 2 Hag. Con. 395, 417, marriage was said to be an institution of the *ius gentium*; the law merchant was also said to be part of the *ius gentium* (ibid. 420). See above, pp. 212-14.

distributed?) on death according to the *lex domicilii*.¹ There are dicta in *Udny v. Udny* suggesting that the rules laid down in that case about the revival of the domicile of origin (rules which are not accepted in the United States, let alone in civil law countries) constituted the correct interpretation of international law.² In *Re Martin Lindley* M.R. said: 'According to international law as understood and administered in England, the effect of marriage on the movable property of persons depends . . . on the domicile of the husband in the English sense.'³ Anyone with the slightest knowledge of comparative private international law knows that the rules laid down in all of these cases are not accepted in a large number of countries. It would be insulting the intelligence of the judges who decided these cases to suppose that they believed such rules were laid down by public international law (as opposed to the private international law of the forum).

The judges also seem to have recognized that a State was at liberty to depart from the rules laid down in such cases. Thus in *Jones v. Marrable* it was said: ' . . . although it is a rule of international law that the succession to personal property is controlled by the law of the domicile, yet it is in the power of any State to change the law in this respect'.⁴ One State, acting on its own, cannot change public international law; it may, according to its own constitutional law, be able to alter its own municipal law in a manner prohibited by public international law, but courts try to interpret municipal law so that it does not conflict with public international law. The tolerant attitude shown by the court towards the possibility of changing the rule that succession to personalty is governed by the *lex domicilii* shows that the court regarded this rule as a rule of private international law, not of public international law.

Again, the fact that English courts are prepared to accept a *renvoi* in cases involving succession to movables and the formal validity of marriage shows that they do not regard the English choice of law rules as being required by public international law; it is hardly likely that English courts would apply foreign choice of law rules which conflict with the English rules if they thought that the foreign choice of law rules were contrary to public international law.

At all events, courts in common law countries have made it clear that they do not believe that application of foreign law is required by public international law. English courts have been silent on this question.⁵ In the United States, however, application of the laws of another member-state

¹ (1852), 55 U.S. 400.

² (1869), L.R. 1 H.L. (Sc. & D.) 441, 452, 457.

³ [1900] P. 211, 233.

⁴ (1845), 6 Humph. 116, 118 (Tennessee).

⁵ In *Feist v. Société intercommunale belge d'électricité*, [1934] A.C. 161, 173, the House of Lords quoted the judgment of the Permanent Court of International Justice in the *Serbian Loans* case. There is, however, no suggestion that the House of Lords regarded itself as bound to follow the Permanent Court's decision; it cited the Permanent Court's decision in the same way that it would cite a foreign authority, as a persuasive precedent.

of the federation is required by the full faith and credit clause of the federal constitution; courts have held that the full faith and credit clause does not apply to foreign laws,¹ and have sometimes added for good measure (as if to emphasize the difference between application of a sister-state's laws and application of foreign laws) that application of foreign laws is not required by public international law either. In *Loucks v. Standard Oil* Judge Cardozo said: 'the sovereign in its discretion may refuse its aid to the foreign right'.² Similar statements appear in a number of decisions by the Supreme Court; in *Hilton v. Guyot* the Court quoted with approval Wheaton's statement that 'there is no obligation . . . to regard foreign laws',³ and in *Magnolia Petroleum Co. v. Hunt* Stone C.J. said that before the full faith and credit clause was adopted the member States of the union were 'independent foreign sovereignties, each free to ignore rights and obligations created under the laws of the others'.⁴ In *Gray v. Gray* a New Hampshire Court supported the vested rights theory, but rejected the idea that a State was under any *legal* compulsion to enforce vested rights.⁵ In *Re Solvang* a Canadian court held that Canadian laws were not binding in foreign countries and were enforced merely as a matter of comity; the court said that 'even the Parliament of the United Kingdom could not enact laws which the authorities of foreign States would be bound to recognize'.⁶

Diplomatic protests and negotiations

Stevenson, in an article entitled 'The Relationship of Private International Law to Public International Law', mentions three incidents where States argued in diplomatic negotiations that there was a duty to apply foreign law.⁷ Close analysis shows, however, that no such argument was in fact used.

In the first place, Stevenson points to the treaty of 10 October 1922 between the United Kingdom and Iraq, which provided that 'in matters relating to the personal status of foreigners or in other matters of a civil and commercial nature in which it is customary by international usage to apply the law of another country, such law shall be applied in manner to be prescribed by law'. But there is a well-known distinction between customs which have the force of public international law and usages which do not; the 'usage' referred to in the treaty was probably meant to denote a usage which did not have the force of law.⁸

¹ *Aetna Life Insurance Co. v. Tremblay* (1912), 223 U.S. 185.

² (1918), 224 N.Y. 99, 111.

⁴ (1943), 320 U.S. 430, 439-40.

⁶ (1918), 43 D.L.R. 549, 553.

⁷ *Columbia Law Review*, 52 (1952), pp. 561, 581-2.

³ (1895), 159 U.S. 113, 166.

⁵ (1934), 87 N.H. 82, 86.

⁸ A similar provision in Article 4 of the Judicial Agreement of 4 March 1931 between the United Kingdom and Iraq was described by Nussbaum, *Principles of Private International Law*

Stevenson's second incident occurred in the early nineteenth century, when a marriage between a United States man and a Mexican woman, celebrated in the United States, was declared void by a Mexican church court. Webster, the United States Secretary of State, instructed the United States minister in Mexico to protest to the church, on the grounds that it was 'the almost universal rule' that 'a marriage is valid if it has been contracted according to the laws of the place where the ceremony was performed'. But Webster seems to have treated 'the almost universal rule' as a rule of comparative law, not of public international law, because he added: 'It may be that the local clergymen concerned have proceeded in conformity to the laws of the Republic [of Mexico] and the rules of the Catholic church as established in Mexico, and therefore that any official application to the Mexican executive would be premature, if not improper.'¹

The third incident arose in 1868. A Swiss woman had emigrated to the United States, married a United States citizen and subsequently died. Her son, a United States citizen, later claimed a share in the estate of his maternal grandfather, but his claim was rejected by the Swiss court on the ground that his mother had not complied with the formalities prescribed by the law of the canton of Aargau, with the result that the marriage was void and her son was illegitimate. The United States minister protested successfully, on the ground that legitimacy should be determined by United States law. But his argument was based on a United States-Swiss treaty: 'Under the treaty, the status of the boy John should be decided by the American and not by the Aargovien law.'²

The United States has often said that title to foreign land must be decided by the courts of the *situs* in accordance with the law of the *situs*. But the emphasis here is on the court of the *situs*, not on the law of the *situs*; such statements are simply designed to reaffirm the rule that local remedies must be exhausted. The United States has frequently made claims where local courts have committed a denial of justice in such cases.³

(1943), p. 42, as unworkable; the treaty does not state whether personal status is to be governed by the *lex patriae*, the *lex domicilii* or religious law.

In an exchange of notes on 1 and 2 November 1946 the British Government said they hoped that Syria would regard the personal status of British subjects in Syria as governed by their national law, and Syria promised to do so (*British and Foreign State Papers*, vol. 147, pp. 1091-4). The British Government did not argue that application of the *lex patriae* was required by public international law, but merely pointed out that this was the practice followed in most countries (although not in the United Kingdom!).

¹ Moore, vol. 2, pp. 484-5. In any case, Webster's 'almost universal rule' is no longer accepted nowadays, except perhaps as regards questions of form.

² *Foreign Relations of the U.S.* (1868), vol. 2, p. 195. The minister probably misinterpreted the treaty, but that does not affect the point that his protest was not based on customary international law. For other claims based on treaties, see Moore, vol. 5, p. 120.

³ Moore, vol. 6, p. 704.

The only recorded example of a protest being based on customary public international law occurred in 1863, when Italy argued that States were obliged by international law to recognize that the estate of an intestate dying without heirs should go to his national State and not to the State of the *situs*.¹ But it is clear that public international law lays down no such rule; in most countries immovables would go to the State of the *situs*, and in many countries (including France) movables would go to the State of the domicile.²

With this dubious exception, States have not based protests on customary public international law. They have made protests but they have based them on other grounds. This reliance on arguments other than customary international law indicates, even more clearly than a total absence of any sort of protests would have done, that States do not consider that customary international law requires the application of foreign law.

Conclusions

In some circumstances application of the *lex fori* instead of foreign law can be contrary to public international law, but only if the *content* of the *lex fori* falls below the minimum international standard. What is wrongful is not the refusal to apply foreign law, but the application of rules whose *content* violates international law.³ We have already seen an example of this in connection with title to property.⁴ Similar situations could arise with regard to the status of individuals. In principle, public international law would not forbid a State to apply its *lex fori* to determine the status of all individuals, even if they had no connection with the State; but the *lex fori* would be contrary to public international law if it treated the individuals as having no legal personality at all, for that would be tantamount to treating them as slaves. Such a law would contravene not only the modern rules of international law protecting human rights, but also the long-established rules laying down a minimum international standard for the treatment of aliens.

It seems, however, that different considerations apply to companies; a State is not obliged to recognize the legal personality of a foreign company.⁵ The idea that a company has no existence outside the territory where it was created was popular during the nineteenth century in the United States and continental Europe, although it has lost favour now.⁶ In many

¹ *La prassi italiana di diritto internazionale*, 1st series, vol. 1, p. 9.

² Batiffol, *Droit international privé* (5th ed., 1971), vol. 2, p. 318.

³ See above, pp. 181-90.

⁴ See above, p. 225.

⁵ Rabel, *The Conflict of Laws*, vol. 2 (2nd ed., 1960), p. 133; *Barcelona Traction* case (1970), *I.C.J. Reports*, 1970, pp. 3, 235 (sep. opinion by Morelli). But cf. Freeman, *The International Responsibility of States for Denial of Justice* (1938), pp. 239-41.

⁶ Rabel, *The Conflict of Laws*, vol. 2 (2nd ed., 1960), pp. 125-8. It still exists in Latin America: Perrin, *La reconnaissance des sociétés étrangères* (Geneva thesis, 1969), pp. 21-2.

countries recognition of a foreign company does not occur automatically, but requires a specific act by the executive, which may sometimes be withheld.¹ However, if a State does not recognize a foreign company, it must treat the company's property as if it were the members' property, so it is still bound by the rules of international law forbidding expropriation of foreign-owned property without compensation.²

It might be objected that a deplorable state of affairs would result if States exploited to the full the absence of any rule of public international law requiring the application of foreign law. But fortunately experience has shown that judges and legislatures are usually willing to adopt a generous and co-operative attitude towards foreign laws without any rule of public international law's compelling them to do so.

Far from leading to greater selfishness on the part of States, more widespread recognition of the absence of rules of public international law on the subject might remove those attitudes of insular complacency and dogmatism which have obstructed reform of private international law in the past. The rules of private international law adopted by one country are unlikely to be satisfactory if they are adopted without paying any attention to the rules adopted by other countries;³ but, if judges or legislators believe that their own rules of private international law are ordained by public international law, they may come to think that there is no need to look at other countries' private international law or to re-examine or reform their own rules. The likely result of such complacency is that private international law will develop in different countries along increasingly divergent lines. Such attitudes will also obstruct the unification of private international law by treaty (a unification which many people, including the author, regard as desirable). One of the reasons for the lack of success of the early Hague Conventions on private international law was that they reflected a belief that application of the *lex patriae* as the personal law was required by public international law; as a result, no concessions were made to the *lex domicilii* States, which therefore never became parties to the Conventions. If it is recognized that public international law does not require the application of foreign law and therefore does not lay down any choice of law rules, States will be much more willing to compromise and to change their choice of law rules, thereby facilitating the conclusion of treaties unifying private international law.

¹ Rabel, *op. cit.* (in the preceding note), pp. 135-42. In Germany foreign associations of a non-commercial character require recognition by an administrative act, otherwise they have no legal personality (E.G.B.G.B., Art. 10). For the position in Nova Scotia, see *Re Provinces & Central Properties Ltd. and the City of Halifax* (1968), 70 D.L.R. (2d) 156.

² Per Judge Morelli in the *Barcelona Traction* case (1970), *I.C.J. Reports*, 1970, pp. 3, 235.

³ Cf. Wolff, *Private International Law* (2nd ed., 1950), p. 16: 'Private international law is not itself international; but it should certainly be drawn up in an international frame of mind.'

3. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

Judicial practice

In *Cottington's* case Lord Nottingham said: 'It is against the law of nations not to give credit to the judgments . . . of foreign countries.'¹ Similar statements appear in several early English cases.² However, the term 'law of nations' seems to have been used, not in the sense of public international law, but in a sense closer to the original Roman *ius gentium*, to mean a universally accepted body of private international law.³ This is shown by *Wier's* case, where the Court of King's Bench said: 'Ceo est per la Ley de Nations que le Justice dun Nation serra aidant al Justice d'auter Nation, & lun d'executer le judgment de l'auter; . . . & le Judge del Admiraltie est le proper Magistrate pur cest purpose, car il solment ad execution del ley Civil deins ces Relme.'⁴ Here we see the law of nations being treated as part of the civil law (i.e. the law derived from Roman law), and being regarded as similar to Admiralty law.

Perhaps as a result of misinterpretation of these cases, one or two nineteenth-century cases came close to stating that recognition or enforcement of foreign judgments was required by international law. For instance, in *Turnbull v. Walker*, Wright J. said that if a court's jurisdiction was founded on the defendant's allegiance or consent, then 'in conformity with . . . international law or usage the courts of other States will regard its judgments as binding and will, with certain exceptions, enforce the judgment', whereas the judgment had merely local force if jurisdiction was founded on other factors (e.g. Order 11 of the Rules of the Supreme Court).⁵ Wright J. seems to have been uncertain whether this practice was based on international law or on mere usage. Again, if the judgment is binding on the courts and not merely on the parties, why is it not enforced without exceptions? It should also be remembered that a foreigner on a brief visit to England is regarded as owing allegiance for the purpose of conferring jurisdiction on English courts; and yet most foreign courts would not enforce an English judgment if the sole ground of the English court's jurisdiction was service of a writ on a foreigner during a brief visit to England.⁶

Such cases are exceptional. As early as 1744 English courts had begun to react against *Cottington's* case by treating foreign judgments as only prima facie evidence of the facts established by the foreign court.⁷ In

¹ (1688), 2 Swanst. 326.

² See the cases cited in *Hilton v. Guyot* (1895), 159 U.S. 113, 170, 173, and also *Hughes v. Cornelius* (1683), 89 E.R. 907, 908. See also Vattel, *The Law of Nations*, Book 2, ss. 84-5.

³ See above, pp. 212-14.

⁴ (1607), Rolle, *Abridgement* vol. 1, p. 530, pl. 12.

⁵ (1892), 67 L.T. 767, 769.

⁶ See above, pp. 170-1.

⁷ *Gage v. Bulkeley*, 27 E.R. 824. Similar views were expressed in *Walker v. Witter* (1778), 99 E.R. 1, in *Galbraith v. Nevill* (1789), 1 Doug. 6 note, and in Joseph Story's *Commentaries on the Conflict of Laws* (1834), s. 608.

Bryant v. Ela the Supreme Court of New Hampshire said that the law of nations required respect for Admiralty judgments only.¹ In *Godard v. Gray* Blackburn J. said: 'It is not an admitted principle of the law of nations that a State is bound to enforce within its territories the judgments of a foreign tribunal. Several of the continental countries . . . do not enforce the judgments of other countries. . . .'² In *Re Solvang* the Supreme Court of Alberta said that judgments are usually recognized abroad as a matter of comity, but that foreign courts are not bound to recognize them.³ The dissenting judges in *Hilton v. Guyot* based enforcement of foreign judgments on the principle *interest reipublicae ut sit finis litium*, and added: 'it is not necessary that we should hold it to be required by some rule of international law'.⁴ In *Magnolia Petroleum Co. v. Hunt* Stone C.J. said that the member states of the federation, before the adoption of the federal Constitution containing the full faith and credit clause, were 'independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others'.⁵ In *Johnston v. Compagnie Générale Transatlantique* it was held that the enforcement of foreign judgments was a 'question . . . of private rather than public international law, of private rather than public relations'.⁶

Until the late eighteenth century English courts seldom enforced foreign laws; they compensated for this restrictive approach by being very liberal in their willingness to enforce foreign judgments.⁷ Courts in civil law countries, which had applied foreign laws for centuries, were much less liberal in their attitudes to foreign judgments. To some extent this difference of approach survives to this day.

A French ordinance of 1629 forbade the enforcement in France of foreign judgments against a French subject.⁸ In cases involving foreign defendants French courts have been somewhat more liberal. The Rouen *Tribunal de commerce* went as far as to say in 1885 that it was contrary to the principles of sovereignty for the courts of one country to order a party to pay back damages which he had been awarded by the courts of another country.⁹ Georges Scelle believed that a total refusal to recognize or

¹ (1815), Smith (N.H.) 396, 404.

² (1870), L.R. 6 Q.B. 139, 148.

³ (1918), 43 D.L.R. 549, 553.

⁴ (1895), 159 U.S. 113, 229. For the majority opinion, see below, p. 236.

⁵ (1943), 320 U.S. 430, 439-40.

⁶ (1926), 242 N.Y. 381.

⁷ Cheshire (and P. M. North), *Private International Law* (8th ed., 1970), pp. 35-7. Cases like *Gage v. Bulkeley* (see above, p. 232 n. 7) constituted only a temporary exception to this practice and do not reflect the modern law.

⁸ See below, p. 238.

⁹ *Depeaux v. Stevenson*, *Journal de droit international* (1885), p. 427. But ordering the plaintiff to pay back damages goes far beyond merely refusing to enforce the judgment; it is a question of undoing the judgment and not simply of disregarding it. In any case, the Tribunal de commerce was probably wrong in thinking that such an order was contrary to public international law; in *Ellerman Lines v. Read*, [1928] 2 K.B. 144 an English court issued an injunction to restrain the defendant from enforcing anywhere in the world a Turkish judgment which he had obtained by fraud.

enforce foreign judgments was contrary to public international law;¹ but the mutual independence of courts in different countries (the principle on which he based his views) could equally well be interpreted to point in the opposite direction.

The actual practice of courts in France and other civil law countries is so restrictive that it is difficult to reconcile with any belief that recognition or enforcement of foreign judgments is required by public international law. Until 1964 a French court, when asked to enforce a foreign judgment, could review it on the merits. *Révision au fond*, as it is called, was disapproved by the French Court of Cassation in *Munzer v. Jacoby-Munzer* in 1964, but it still exists in Belgium, Quebec (but not normally for judgments from other Canadian provinces) and Portugal, and to some extent in Greece and Italy;² the law in Luxembourg is unsettled.³ The *Munzer* case reaffirmed another condition laid down by French law—the foreign court must have applied the law designated as applicable by French choice of law rules, or must at least have applied a law having the same content. France is not alone in laying down such conditions; Poland does the same, where Polish choice of law rules require the application of Polish law.⁴ Japanese courts recognize foreign divorces only if they apply the system of law regarded as applicable by Japanese choice of law rules.⁵ German courts refuse to recognize foreign judgments against German nationals in various fields of family law whenever German choice of law rules require the application of German law and the foreign court has applied another system of law.⁶

Other countries go even further in denying effect to foreign judgments. The Netherlands law recognizes foreign judgments for various purposes, but will not enforce an award of damages by a foreign court unless there is a treaty or special law requiring enforcement.⁷ The same rule applies in Norway.⁸ Foreign judgments were not enforced in pre-war Poland⁹ or Russia;¹⁰ the same rule applies in Sweden today.¹¹

Even countries which enforce most foreign judgments often exclude certain categories of foreign judgments. For instance, foreign bankruptcy

¹ *Précis du droit des gens* (1934), vol. 2, p. 94. This view is supported by Freeman, *The International Responsibility of States for Denial of Justice* (1938), pp. 398–9.

² Nadelmann, *American Journal of International Law*, 13 (1964), p. 724; Batiffol, *Droit international privé* (5th ed., 1971), vol. 2, p. 445; T.M.C. Asser Instituut, *Statutory Private International Law* (1971), p. 171.

³ *Journal de droit international* (1971), p. 153.

⁴ Jodlowski, *ibid.* (1966), pp. 539, 562.

⁵ *Japanese Annual of International Law*, 9 (1965), p. 223.

⁶ Z.P.O., Art. 328–I, no. 3.

⁷ Batiffol, *op. cit.* (n. 2 on this page), p. 443.

⁸ *Nederlands Tijdschrift voor Internationaal Recht* (1967), p. 259.

⁹ *Nochimzon v. Zellstoffabrik Waldhof Tilsit* (1933), *Annual Digest*, 1933–34, p. 21.

¹⁰ De Lapradelle and Niboyet, *Répertoire de droit international* (1930), vol. 7, p. 121.

¹¹ Eek, *International and Comparative Law Quarterly*, 20 (1971), pp. 605, 608. Similarly in Denmark: Philip, *Nederlands Tijdschrift voor Internationaal Recht*, 19 (1972), pp. 227–8.

adjudications are not recognized in Germany, Switzerland, the Netherlands or (usually) the United States.¹ Courts in English-speaking countries, which claim the power to issue injunctions concerning conduct abroad, usually pay little attention to foreign injunctions.² Despite Vattel's statement that States are obliged to recognize the appointment of guardians by foreign courts,³ courts generally do not hesitate to disregard orders by foreign courts when deciding the custody of children;⁴ in the *Desramault* case a French court refused to follow an English magistrates' court order concerning custody, which led to a debate in the British Parliament, but no one claimed that public international law obliged the French court to recognize the English decision.⁵ In Chile, Brazil and Argentina divorce is regarded as contrary to public policy and foreign divorces are not recognized.⁶ In the absence of treaties,⁷ criminal judgments are never enforced abroad, and neither are judgments on questions of tax law or other laws of a 'prerogative' or 'public' character;⁸ if there were a duty to enforce foreign judgments, it would be hard to explain why it did not extend to criminal, tax or other 'public' law judgments, since the adjudicating State has a greater interest in securing enforcement of such judgments than in securing enforcement of judgments in 'private' law cases.

Some guidance may also be obtained from the attitudes of courts to letters of request (or, as they are called in the United States, letters rogatory), i.e. requests sent by the courts of one State to the courts of another State asking the latter to take evidence on behalf of the former. In 1921 the Soviet Union refused to enforce letters of request in the absence of a treaty.⁹ Normally courts are more co-operative, but authority is divided on the question whether international law imposes any duty on courts to act in accordance with letters of request.¹⁰ At one time writers tended to believe that such a duty existed,¹¹ but recently this view has lost favour.¹² Courts

¹ Wolff, *Private International Law* (2nd ed., 1950), p. 560; Nadelmann, *American Journal of Comparative Law*, 11 (1962), p. 628.

² Nussbaum, *Columbia Law Review*, 41 (1941), pp. 221, 224.

³ *The Law of Nations*, Book 2, s. 85.

⁴ *McKee v. McKee*, [1951] A.C. 352; *Republic of Iraq v. First National City Bank of Chicago* (1962), I.L.R., vol. 42, pp. 26, 29 (c.d. 382 U.S. 982); Batiffol, *Droit international privé*, vol. 2 (5th ed., 1971), pp. 121 et seq.

⁵ *Hansard*, H.C. Deb. (1971), vol. 812, written answers, col. 516; vol. 814, cols. 1319-28.

⁶ Valladão, *Recueil des cours*, 133 (1971), pp. 413, 519.

⁷ Shearer, *Extradition in International Law* (1971), pp. 71-2.

⁸ Although criminal judgments are not enforced, their effects may sometimes be recognized (e.g. revocation of a driving licence); but there is no evidence that such recognition is required by public international law. Extradition usually takes the place of enforcement, but it is generally agreed nowadays that there is no duty to extradite in the absence of a treaty.

⁹ *Gurdus v. Philadelphia National Bank*, *Annual Digest*, 1919-42, pp. 62-3.

¹⁰ *American Journal of International Law*, 33 (1939), Supplement, pp. 43-4.

¹¹ *Ibid.*

¹² De Lapradelle and Niboyet, *Répertoire de droit international* (1929), vol. 4, pp. 71, 103; Riezler, *Internationales Zivilprozessrecht* (1949), p. 674.

have generally denied that there is such a duty,¹ and the same view was taken in a circular sent by the French Ministry of Justice to Procurators-General.²

Comity and reciprocity

It is not necessary to invoke public international law in order to find reasons for enforcing foreign judgments. The desire to do justice for individuals, which explains the application of foreign laws,³ also explains the recognition and enforcement of foreign judgments; there is also the consideration that litigation should not be protracted indefinitely, summed up in the maxim *interest reipublicae ut sit finis litium*.⁴ Recognition and enforcement of foreign judgments also lead to stability in family and business relations, which is socially convenient and desirable.

In *Hilton v. Guyot* the United States Supreme Court held that foreign judgments were enforced as a matter of comity, which it regarded as something more than 'mere courtesy and good will', but falling short of a duty imposed by public international law.⁵ The practical effect of comity, as far as foreign judgments were concerned, was that they would be enforced in United States courts only if United States judgments were enforced in the foreign State in question.⁶ The rule of reciprocity, laid down in *Hilton v. Guyot*, has been severely criticized in the United States,⁷ and is now virtually a dead letter because the Supreme Court subsequently decided that federal courts must apply the conflict rules of the state where they sit,⁸ and reciprocity is required in only one or two states of the union.⁹ However, a reciprocity requirement exists in many foreign States, including Austria,¹⁰ several Swiss cantons,¹¹ Spain,¹² Israel,¹³ Yugoslavia,¹⁴ Japan,¹⁵ Colombia,¹⁶ Poland,¹⁷ Czechoslovakia (if the defendant is a Czech national),¹⁸ Lebanon,¹⁹

¹ *American Journal of International Law*, 33 (1939), Supplement, pp. 43-4; *Journal de droit international* (1909), p. 459, (1911), p. 185, (1912), pp. 176, 1143; *Kuehling v. Liebman* (1873), 9 Phila. 160, 163; *Ex parte Taylor* (1920), 220 S.W. 74.

² *American Journal of International Law*, 33 (1939), Supplement, pp. 43-4; but see the opinion of the United States Attorney-General Knox, reported in D. R. Deener, *The United States Attorneys-General and International Law* (1957), p. 284.

³ See above, p. 221.

⁴ *Hilton v. Guyot* (1895), 159 U.S. 113, 229.

⁵ (1895), 159 U.S. 113, especially 163-4, 166.

⁶ *Ibid.* 227-8. The case was decided by 5 votes to 4; the dissenting judges considered that foreign judgments should be enforced without proof of reciprocity. See also above, p. 233.

⁷ Briggs, *The Law of Nations* (2nd ed., 1952), pp. 407-8.

⁸ *Klaxon Company v. Stentor Electric Manufacturing Co., Inc.* (1941), 313 U.S. 487.

⁹ Von Mehren and Trautman, *Harvard Law Review*, 81 (1968), pp. 1601, 1662.

¹⁰ T.M.C. Asser Instituut, *Statutory Private International Law* (1971), p. 105.

¹¹ *Ibid.*, p. 108.

¹² *Ibid.*, p. 154.

¹³ *Ibid.*, p. 243.

¹⁴ *Ibid.*, p. 289.

¹⁵ *Code of Civil Procedure*, Art. 200 (4).

¹⁶ *Dagher v. Dagher* (1958), I.L.R., vol. 26, p. 57.

¹⁷ Jodlowski, *Journal de droit international* (1966), pp. 539, 562.

¹⁸ Kucera, *ibid.*, pp. 783, 803.

¹⁹ Batiffol, *Droit international privé* (5th ed., 1971), vol. 2, p. 443.

Germany,¹ Hungary,² Liechtenstein,³ Roumania,⁴ Turkey⁵ and many non-European countries.⁶ Indeed, one of the considerations which strongly influenced the Supreme Court in *Hilton v. Guyot* was the fact that a reciprocity requirement existed in many countries.⁷

The widespread existence of reciprocity requirements suggests that enforcement of foreign judgments is not required by public international law. Of course, even if it were required by public international law, it would still be lawful for States to take reprisals against States which did not enforce judgments. But refusing enforcement of foreign judgments as an act of reprisal presupposes that it is for the defendant to prove (or for some governmental authority to determine) that the State whose courts have given the judgment does not enforce foreign judgments, whereas the whole essence of reciprocity is that the onus is on the plaintiff to prove that the State whose courts have given the judgment does enforce foreign judgments—and in Germany, at least, this can often be very difficult to prove.⁸

Bilateral rules of jurisdiction and exclusive jurisdiction

An almost universal requirement for the recognition of foreign judgments is that the foreign court should have jurisdiction according to the rules of private international law in force in the State where recognition is sought. The fact that the rules governing the jurisdiction of courts in the foreign State are different is usually disregarded. As a result, there is a tendency for the rules governing the jurisdiction of courts in State *A* to be used as a guide by the courts in State *A* in order to determine when they will recognize or enforce foreign judgments; unilateral rules become bilateral rules. If a wife can sue for divorce in England after being ordinarily resident there for three years, English courts recognize that foreign courts have jurisdiction to try divorce petitions brought by wives who have been ordinarily resident for three years in the foreign State concerned.⁹

There are, however, two points which need to be noted. First, the process of converting unilateral rules into bilateral rules is not always complete. English courts have for many years exercised jurisdiction in certain cases where a writ (or, rather, notice of a writ) has been served on

¹ Nadelmann, *American Journal of Comparative Law*, 13 (1964), pp. 72, 78.

² Wolff, *Private International Law* (2nd ed., 1950), p. 254.

³ Riezler, *Internationales Zivilprozessrecht* (1949), p. 552.

⁴ Ibid.

⁵ Ibid.

⁶ Wolff, op. cit. (n. 2 on this page), p. 254.

⁷ (1895), 159 U.S. 113, 218–27.

⁸ Nadelmann, *American Journal of Comparative Law*, 13 (1964), pp. 72, 78. The distinction between retaliation and reciprocity was emphasized in *Hilton v. Guyot* (1895), 159 U.S. 113, 228.

⁹ *Travers v. Holley*, [1953] P. 246; *Robinson-Scott v. Robinson-Scott*, [1958] P. 71. See, generally, Nussbaum, *Columbia Law Review*, 41 (1941), p. 221. Holleaux, *Compétence du juge étranger et reconnaissance des jugements* (1970), argues that recognition of foreign judgments should not be limited by this requirement; his argument, which is couched almost entirely only in terms of French law, was followed by the Paris Court of Appeal in 1971 (*Journal de droit international*, 100 (1973), p. 239), but most French judgments are incompatible with it.

the defendant abroad, but they refuse to enforce judgments of a foreign court given in similar circumstances.¹ The position is the same in many Commonwealth countries.² As Wolff says, 'every State is inclined to concede to its own courts a wider jurisdiction than it is prepared to recognize in foreign courts, and no rule of international law prevents States from establishing such discordance'.³

Secondly, States sometimes claim exclusive jurisdiction over certain kinds of case, and the result of this is that they refuse to recognize the jurisdiction or judgments of foreign courts in such cases.⁴ Most States claim that their own courts have exclusive jurisdiction over land situated in their own territory, and continental courts often claim exclusive jurisdiction in specialized types of case (e.g. insurance, labour law and patents),⁵ but often claims to exclusive jurisdiction are more far-reaching. The French ordinance of 1629 which forbade the execution in France of foreign judgments against French nationals was based on the idea that French courts had exclusive jurisdiction over French nationals;⁶ a similar rule exists in France to this day.⁷ Swiss courts have exclusive jurisdiction over personal actions against persons domiciled in the canton in question.⁸ Hungarian courts claim exclusive jurisdiction in divorce cases if either party is a Hungarian national.⁹ A somewhat similar rule exists in Yugoslavia,¹⁰ which also claims exclusive jurisdiction in succession cases over immovables in Yugoslavia and over movables left abroad by Yugoslav nationals.¹¹ In France a *clause compromissoire* conferring jurisdiction on French courts is regarded as ousting the jurisdiction of foreign courts.¹²

The practice outlined in the preceding pages suggests that the recognition and enforcement of foreign judgments are marked by so many inconsistencies that it is virtually impossible to argue that recognition and enforcement are required by public international law.

¹ *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155.

² Read, *Recognition and Enforcement of Foreign Judgments* (1938), pp. 138-9; *Sharpes Commercials Ltd. v. Gas Turbines Ltd.*, [1956] N.Z.L.R. 819.

³ Wolff, *Private International Law* (2nd ed., 1950), p. 53.

⁴ German courts do not recognize foreign judgments if, under German private international law, a German court or a court of a third State had exclusive jurisdiction: von Mehren and Trautman, *Harvard Law Review*, 81 (1968), pp. 1601, 1611-12. A similar rule exists in Poland (*Journal de droit international* (1966), p. 557), and (where Czechoslovak courts claim exclusive jurisdiction) in Czechoslovakia (*ibid.*, p. 802).

⁵ Weser, *American Journal of Comparative Law*, 10 (1961), pp. 323, 337-8.

⁶ Holleaux, *op. cit.* (above, p. 237 n. 9), p. 204.

⁷ Batiffol, *Droit international privé* (5th ed., 1971), vol. 2, p. 425.

⁸ Fragistas, *Recueil des cours*, 104 (1961), pp. 165, 228-9. A similar rule exists in France: Batiffol, *op. cit.* (in the preceding note), p. 426.

⁹ Szászy, *Private International Law in the European Peoples' Democracies* (1964), pp. 353, 355.

¹⁰ Katičić, *Recueil des cours*, 131 (1970), pp. 393, 475-7; also in Poland: *Journal de droit international* (1966), p. 557.

¹¹ Katičić, *loc. cit.* (in the preceding note), p. 483. Poland claims exclusive jurisdiction over the succession of a Polish national who dies in Poland: *loc. cit.* (in the preceding note), p. 557.

¹² Batiffol, *Droit international privé* (5th ed., 1971), vol. 2, p. 425.

Diplomatic protests

Treaties are often made for the mutual recognition and enforcement of judgments, and the only diplomatic dispute concerning the enforcement of judgments which has ever come before an international tribunal concerned the interpretation of a treaty for the reciprocal enforcement of judgments.¹ On one occasion the United Kingdom protested against the non-recognition of an English judgment, on the grounds that non-recognition was contrary to 'comity' and 'general usage'; the protest was not based explicitly on international law.² In 1888 the United States protested against a French refusal to recognize a United States naturalization judgment, on the grounds that judgments entered by a competent court 'are ubiquitous in their effect';³ here again, the protest was based on general usage rather than on international law, and in any case laws and judgments concerning nationality are really in a class of their own.⁴ In 1910 the United States described the 'general rule that judgments secured in one country are, as a matter of comity, enforced in the other country' as 'a rule well recognized in international law'.⁵ This statement appeared in a *tu quoque* reply to a German complaint that United States courts discriminated against Germans; the German complaint was not based on international law, and the United States did not press the accusation that German non-enforcement of United States judgments was contrary to international law. In any case, the reference to comity⁶ may suggest that 'international law' here meant private international law.

Prize courts

As we have seen, there is little evidence to suggest that recognition and enforcement of foreign judgments are required by public international law, and a good deal of evidence to suggest that they are not. But prize courts may constitute an exception. Some of the dicta concerning prize judgments are inconclusive. For instance, in *The Odessa* the Privy Council said: 'As the right to seize is universally recognized, so also is the title which the

¹ *Italy v. Peru* (1903), R.I.A.A., 9 (1959), p. 79.

² Stevenson, *Columbia Law Review*, 52 (1952), pp. 561, 585-6. In this case the United Kingdom was arguing that the court of the decedent's last domicile had exclusive jurisdiction to determine the validity of a will of movables. But this view, although supported by Vattel (*The Law of Nations*, Book 2, s. 85), does not reflect the practice of English courts: *Dicey and Morris on the Conflict of Laws* (8th ed., 1967), rules 87, 95, 97. See also above, p. 238 at n. 11.

³ *Foreign Relations of the U.S.* (1888), vol. 1, p. 511.

⁴ See above, pp. 216-17.

⁵ *Foreign Relations of the U.S.* (1910), p. 522.

⁶ The statement was made fifteen years after the Supreme Court's decision in *Hilton v. Guyot*, where the Court said that foreign judgments were enforced as a matter of comity, and interpreted comity to mean something less than an obligation imposed by public international law. See above, p. 236.

judgment of the Court creates. The judgment is of international force. . . .¹ Is this a statement of fact (judgments are recognized) or of law (judgments must be recognized)? The Italian Prize Tribunal was more forthright in *The Polinnia*, when it said that judgment gives the capturing State a title 'which other States must recognize in the sphere of their municipal law in obedience to a duty imposed by international law'.² Similar views were expressed by Phillimore in a Law Officer's opinion,³ and a Netherlands court held that international law forbade the Netherlands courts to question a decision of a German prize court, even if it was contrary to international law.⁴ On the other hand, Heffter believed that States were under no duty to recognize titles created by foreign prize court decisions.⁵

If international law does require States to recognize foreign prize court decisions, this can best be explained as an exception to the general rule which does not require recognition or enforcement of foreign judgments,⁶ and it can be justified by the special functions which the laws of war confer on prize courts.

4. THE ACT OF STATE DOCTRINE

Where the defendant is a servant or agent of a foreign State

An individual cannot be sued or prosecuted in one State for acts of war committed on behalf of another State; the place where the act was committed is irrelevant.⁷ This rule of international law protects not only members of the armed forces, but also civilians in certain circumstances, e.g. if a civilian burns crops on military orders in order to prevent the crops' falling into the hands of advancing enemy forces.⁸ The same rule probably applies to hostilities falling short of war,⁹ although some authorities deny this.¹⁰

¹ [1916] 1 A.C. 145, 154. See also *Dobree v. Napier* (1836), 132 E.R. 301, 306, and *The Cysne* (1930), R.I.A.A., 2 (1949), p. 1050.

² (1941), *Annual Digest*, 1943-45, pp. 490, 492-3.

³ McNair, *International Law Opinions* (1956), vol. 3, p. 74.

⁴ *De Hoop* (1921), *Annual Digest*, 1919-22, p. 489. This judgment may be influenced by the exaggerated ideas which Netherlands courts have of the act of State doctrine; see below, p. 248.

⁵ *Le droit international public de l'Europe* (4th French ed.), s. 172.

⁶ This is the view taken by Luigi Sico, *Toute prise doit être jugée* (1971), pp. 233-61.

⁷ Wright, *American Journal of International Law*, 39 (1945), pp. 257, 271-2; Holdsworth, *Columbia Law Review*, 41 (1941), pp. 1313, 1318. Cases which make exceptions to this principle (see below, p. 241 at nn. 3-6) expressly or impliedly acknowledge that the principle applies when the exceptions are not relevant.

⁸ *Ford v. Surget* (1878), 97 U.S. 594, 606. Note that in this case the enemy forces had not yet occupied the area in question. If they had already occupied it, the individual would have been a saboteur and would not have been protected by the rule: see below, p. 241 n. 2.

⁹ *Macleod's case*, Moore, vol. 2, p. 25; *Commonwealth v. Blodgett* (1846), 12 Metcalf 56 (*obiter dicta* by Supreme Judicial Court of Massachusetts).

¹⁰ *Schooner Exchange v. McFaddon* (1812), 7 Cranch 116, 140 (*obiter*); *Re B.P.Z.S.* (1955), I.L.R., 22 (1955), p. 208 (but the defence of act of State was not pleaded).

There are, however, a number of exceptions. The act of State doctrine, as it is called, does not prevent charges of treason or similar crimes being brought against persons who by reason of their nationality or residence owe allegiance to the adjudicating State.¹ Nor does it protect unprivileged belligerents, such as spies and saboteurs.² Above all, it does not protect those who are charged with war crimes,³ crimes against peace,⁴ crimes against humanity⁵ or genocide.⁶ On the other hand, a defendant who is not himself guilty of a crime against peace does not lose his immunity solely by reason of the fact that the war in which he is fighting is an aggressive war.⁷

The act of State doctrine is not limited to acts of war. In the *Macleod* case the United Kingdom argued that international law prevented foreign courts from sitting in judgment on 'a public act of persons in Her Majesty's service, obeying the order of their superior authorities'.⁸ The Committee of Experts for the Progressive Codification of International Law stated in 1927 that 'the inability of courts to exercise jurisdiction in regard to a sovereign act of a foreign government . . . should apply where the defendant is sued personally for acts done by him in his capacity as a public official—though he no longer retains that capacity at the time of the proceedings—or under powers conferred upon him by a foreign State'.⁹ The rule that a diplomat is immune from proceedings in respect of his official acts after the expiry of his term of office is explained by several writers (and by members of the International Law Commission when discussing what later became the Vienna Convention) by saying that such acts are acts of State—in other words, the rule about diplomats is part of a wider rule about State servants in general.¹⁰

¹ *R. v. Neumann* (1946), *Annual Digest*, 1946, p. 239; *Mittermaier* (1946), *ibid.*, p. 69; *Public Prosecutor v. Drechsler* (1946), *ibid.*, p. 73; *Bittner* (1946), *ibid.*, p. 95; *Colman* (1947), *ibid.*, 1947, p. 139; *Public Prosecutor v. Koi*, [1948] A.C. 829; *Lamar v. Browne* (1876), 92 U.S. 187; Hackworth, vol. 2, p. 406. But see Elman, *International and Comparative Law Quarterly*, 18 (1969), p. 178.

² Baxter, this *Year Book*, 28 (1951), p. 323.

³ See the authorities cited above, p. 240 n. 7; *Goering* (1946), *Annual Digest*, 1946, pp. 203, 221-2.

⁴ *Goering*, *ibid.*; *Weizsaecker* (1949), *ibid.*, 1949, pp. 344, 348-9.

⁵ *Goering*, loc. cit. (n. 3 on this page), *Eichmann* (1961-2), I.L.R., vol. 36, pp. 44-8, 308-12; *State v. Schumann* (1966), *ibid.*, vol. 39, pp. 433, 438.

⁶ *Eichmann*, loc. cit. (above, in the preceding note).

⁷ *List* (1948), *Annual Digest*, 1948, pp. 632, 636-7 (see also pp. 412-22); *Wright*, *American Journal of International Law*, 39 (1945), pp. 257, 267; *Kelsen*, *International and Comparative Law Quarterly*, 1 (1947), pp. 153, 156 et seq.; *H. Lauterpacht*, this *Year Book*, 30 (1953), pp. 206, 218; *Dunbar*, *Juridical Review* (1963), pp. 246, 264-73; *Oppenheim*, *International Law* (7th ed., by H. Lauterpacht, 1952), vol. 2, pp. 218-20.

⁸ It is uncertain whether the United States thought that this principle should be limited to members of the armed forces (*Moore*, vol. 2, pp. 25, 29), but other incidents in United States practice make clear that the principle applies to civilian officials as well as to members of the armed forces (*ibid.* 23-4, 29). See also *Restatement, Second, Foreign Relations Law of the U.S.* (1965), s. 66 (f).

⁹ Cited by *Kelsen*, *California Law Review*, 31 (1943), pp. 530, 540.

¹⁰ *Dinstein*, *International and Comparative Law Quarterly*, 15 (1966), pp. 76, 82-7.

This view is confirmed by many decisions of municipal courts. In *Hatch v. Baes* a New York court said: 'The immunity of individuals from suits brought in foreign tribunals for acts done within their own States, in the exercise of the sovereignty thereof, . . . has the sanction of the most approved writers on international law.'¹ A United States court held in *Lyders v. Lund* that such a suit is an action against the State itself, and must therefore be dismissed.² English courts have also dismissed such suits, but without clearly basing their decisions on international law.³ Australian,⁴ Belgian⁵ and French⁶ courts regard the rule as based on a form of sovereign immunity, and thus required by international law. The rule was not followed by the Supreme Court of Eire,⁷ nor in a decision of a Netherlands court of first instance in 1923;⁸ but the latter decision no longer represents the Netherlands law, since the Amsterdam Court of Appeal decided in *Republic of the South Moluccas v. Royal Packet Shipping Company* that international law prohibited the Netherlands courts from hearing actions against the servants or agents of a foreign State.⁹ It is not necessary that the defendant should be an official of the foreign State; the rule applies equally to commercial companies acting on behalf of the State.¹⁰

The application of the act of State doctrine to acts other than acts of war is, however, subject to a number of exceptions.

First, since it is an off-shoot of sovereign immunity, and since sovereign immunity probably no longer extends to acts *iure gestionis*, the servant or agent of a State cannot claim immunity in respect of acts *iure gestionis*.¹¹

Secondly, the French Court of Cassation held in *Brocard v. Brégante* that the doctrine does not apply when both parties are nationals of the State of the forum.¹² However, this exception is very doubtful. *Brocard v. Brégante* is the only case in which the question has even been mentioned, but there

¹ (1876), 7 Hun. 596, 600 (this was an action against a former President of the Dominican Republic in respect of his official acts). See also *Underhill v. Hernandez*, below, pp. 244-5.

² (1929), *Annual Digest*, 1929-30, p. 321.

³ *Dobree v. Napier* (1836), 2 Bing. (N.C.) 781; *Carr v. Francis Times*, [1902] A.C. 176; *Twycross v. Dreyfus* (1877), 5 Ch. D. 605 (although the real point in this case was that the foreign government had an interest in *property* held by the defendant, as in *Frazier v. Hanover Bank* (1953), I.L.R. 20 (1953), p. 173).

⁴ *Grunfeld v. U.S.A.* (1968), 3 N.S.W. Reports 36; *Journal de droit international* (1970), p. 146.

⁵ *Urrutia and Amollobieta v. Martiarena* (1937), *Annual Digest*, 1935-37, p. 237.

⁶ Paris Court of Appeal, 23 August 1870; *Lakhowsky v. Swiss Federal Government* (1921), *Journal de droit international* (1921), p. 179; *Esnault-Pelterie v. The A. V. Roe Co., Ltd.* (1925), *ibid.* (1925), p. 702; Aix Court of Appeal, 30 December 1929, Sirey 1930. 2. 153; Dunbar, *Recueil des cours*, 132 (1971), pp. 197, 230-1; *Martin v. Bank of Spain* (1952), *Journal de droit international* (1953), p. 654.

⁷ *Saorstat and Continental Shipping Co. v. Rafael de la Morenas*, *Annual Digest*, 1943-45, p. 97.

⁸ *Advokaat v. Schuddink*, *ibid.*, 1923-24, p. 133.

⁹ (1951), I.L.R. 17 (1950), p. 143.

¹⁰ *Twycross v. Dreyfus*; *Esnault-Pelterie v. The A. V. Roe Co. Ltd.*; *Republic of the South Moluccas v. Royal Packet Shipping Company*; Dunbar, *Recueil des cours*, 132 (1971), pp. 197, 230-1.

¹¹ *Nashashibi v. Consul-General of France in Jerusalem* (1958), I.L.R., vol. 26, p. 190.

¹² (1875), Kiss, *op. cit.* (above, p. 147 n. 6), vol. 3, p. 261.

are several other cases where both parties had the nationality of the State of the forum, and yet the act of State doctrine was held to apply.¹

Thirdly, it is possible that the act of State doctrine does not apply to acts which are contrary to international law. The cases concerning war crimes and crimes against peace might be cited in this connection,² but most of them emphasize that the acts were *crimes* against international law, so it is doubtful whether they apply to breaches of international law which are not crimes against international law. It is true that there are cases of other breaches of international law where the act of State doctrine was not applied, but the point we are discussing was not expressly mentioned in these cases, and the cases can be explained on a different ground.³ In the *Macleod* case the New York court and Senator Calhoun thought that Macleod was not entitled to immunity because the United Kingdom's act was contrary to international law,⁴ but Webster, the United States Secretary of State, considered that Macleod was entitled to immunity even though the United Kingdom had broken international law.⁵ In *Republic of the South Moluccas v. Royal Packet Shipping Company* the Amsterdam Court of Appeal held that international law required the application of the act of State doctrine even in the case of acts which were contrary to international law.⁶ It is much better that the injured State should pursue a claim for compensation against the wrong-doing State, instead of punishing an individual who probably knows nothing about international law and who probably genuinely believed that he was doing his duty for the wrong-doing State.

Fourthly, it would seem that the act of State doctrine does not apply to acts done on the territory of the adjudicating State,⁷ unless the action is for

¹ *Dobree v. Napier* (1836), 2 Bing. (N.C.) 781; *Carr v. Francis Times*, [1902] A.C. 176; Aix Court of Appeal, 30 December 1929, Sirey 1930. 2. 153.

² See above, p. 241.

³ *Kämpfer v. Public Prosecutor of Zürich* (1939), *Annual Digest*, 1941-42, p. 6; *Iseli v. Public Prosecutor of Zürich* (1954), I.L.R., vol. 21 (1954), p. 80 (*obiter*). See below, n. 7 on this page.

⁴ This view is approved by Wharton, *Digest of International Law* (1887), vol. 1, p. 67.

⁵ Pitt Cobbett, *Cases and Opinions on International Law* (3rd ed., 1909), vol. 1, p. 83. The United Kingdom did not use this argument because it was not prepared to concede that it had broken international law. See, generally, Moore, vol. 2, pp. 24-30.

⁶ (1951), I.L.R. 17 (1950), p. 143. See below, pp. 248-9.

⁷ There are a large number of cases which can only be explained on this ground, although the point was not explicitly discussed in most of them: *R. v. Leslie* (1860), 8 Cox C.C. 269; *Vavasseur v. Krupp* (1878), 9 Ch. D. 351, 355, 358; *Szalatnay-Stacho v. Fink*, [1947] K.B. 1; *U.S.A. and Republic of France v. Dollfus Mieg et Cie. S.A.*, [1952] A.C. 582; *U.S. v. Deutsches Kalisyndikat Gesellschaft* (1929), 31 F. 2d 199; *U.S. v. Sisal Sales Corporation* (1927), 274 U.S. 268, as interpreted in *Continental Ore Co. v. Union Carbide and Carbon Corp.* (1962), 370 U.S. 690, 705; *Wright v. Cantrell* (1944), *Annual Digest*, 1943-45, p. 133 (Australia); *Kämpfer v. Public Prosecutor of Zürich* (1939), *ibid.*, 1941-42, p. 6 (Switzerland); *Iseli v. Public Prosecutor of Zürich* (1954), I.L.R., vol. 21 (1954), p. 80 (Switzerland); *Mesdag v. Heyermans* (1898), *Journal de droit international* (1899), p. 618 (Belgium). *Contra*, *Esnault-Pelterie v. The A. V. Roe Co. Ltd.* (1925), *ibid.* (1925), p. 702 (France). The *Macleod* case can be distinguished on the grounds that it involved an act of war. See also *Hatch v. Baez*, above, p. 242.

breach of a contract made with the foreign State.¹ There do not appear to be any cases about acts done in the territory of a third State.

However, by allowing officials of another State to act on his territory, the sovereign is sometimes regarded as having by implication granted them certain immunities (which may include immunity from proceedings in respect of official acts); the immunities are based on an obligation not to derogate from his grant of a right of entry.² The rules concerning diplomatic and consular immunities are well established, but even here it should be noticed that immunities are based, not on the appointment by the sending State, but on the recognition of the appointment by the receiving State;³ consequently, a consul enjoys immunity only in respect of his consular functions, not in respect of other functions which he performs on behalf of the sending State.⁴ The position with respect to other types of officials is less clear. When an agent of one government is received in the territory of another for specific purposes and given specific immunities by inter-governmental agreement, this implies that he is entitled to no other immunities.⁵ Some cases imply that there is no immunity unless it is expressly conferred by treaty,⁶ although in one case a French court swung to the opposite extreme by holding that members of a government in exile had the same immunities as an Ambassador.⁷ The rules of customary international law governing visiting forces are particularly controversial.⁸

Where the defendant is not a servant or agent of a foreign State

The judgments in some of the cases brought against servants or agents of a foreign State contain sweeping *obiter dicta*. For instance, in *Hatch v Baez* it was said: 'By the . . . established rules of international law, the courts of one country are bound to abstain from sitting in judgment on the acts of another State done within its own territory.'⁹ In *Underhill v.*

¹ *Grunfeld v. U.S.A.* (1968), *ibid.* (1970), p. 146 (Australia); *Lakhowsky v. Swiss Federal Government* (1921), *ibid.* (1921), p. 179 (France); Hackworth, vol. 2, p. 472; *Twycross v. Dreyfus* (1877), 5 Ch. D. 605; Nancy Court of Appeal, 31 August 1871, Sirey 1871. 2. 129; Aix Court of Appeal, 30 December 1929, Sirey 1930. 2. 153; Tribunal civil de la Seine, 31 January 1949, *Journal de droit international* (1946-49), p. 4.

² *The Schooner Exchange v. M'Faddon* (1812), 7 Cranch 116.

³ Dinstein, *International and Comparative Law Quarterly*, 15 (1966), pp. 76, 87-9; *Heirs of Shababo v. Heilen* (1953), I.L.R. 20 (1953), p. 391.

⁴ Beckett, this *Year Book*, 21 (1944), pp. 34, 49.

⁵ *Fenton Textile Association v. Krassin* (1921), 38 T.L.R. 259.

⁶ *Polish Officials in Danzig* (1932), *Annual Digest*, 1931-32, p. 130; *Mesdag v. Heyermans*, *Journal de droit international* (1899), p. 618.

⁷ President of the Civil Tribunal, Le Havre, 13 April 1915, Dalloz, 1915. 5. 3. *Contra*, *Szalatnay-Stacho v. Fink*, [1947] K.B. 1. See also *Re Amand*, [1941] 2 K.B. 239; [1942] 1 K.B. 445.

⁸ Brownlie, *Principles of Public International Law* (2nd ed., 1973), pp. 354-8.

⁹ (1876), 7 Hun. 596, 599. This rule only applies to acts done by a State within its own territory; it does not apply to acts done by a State as a belligerent occupant (*State of the Netherlands v. Federal Reserve Bank* (1951), I.L.R. 18 (1951), pp. 558, 564; *contra*, *Papadopoulos case*, *Annual Digest*, 1925-26, p. 27, and *ibid.*, 1927-28, p. 34), or in the State of the forum (*Victory*

Hernandez the United States Supreme Court said: 'Every State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.'¹

These dicta have been followed and applied in many cases where the defendant was not a servant or agent of a foreign State. But there is an essential difference between the two groups of cases. Where the defendant is a servant or agent of the foreign State, the act of State doctrine protects him because that doctrine is a corollary of sovereign immunity; the immunity of the State extends to its servants and agents. But there can be no reason for extending the immunity of the State to private individuals or companies who buy expropriated property from the expropriating State² or to other persons who are not servants or agents of the State. There are also other differences. In actions brought against servants or agents of the State, the court merely holds that their immunity prevents the case's being tried; in actions brought against purchasers of expropriated property, the court usually holds, not that they have immunity, but that they have a good title to the property. Appearance by a State as plaintiff is usually regarded as a waiver of immunity, but in the *Sabbatino* case the United States Supreme Court held that the act of State doctrine prevents the court's questioning the legality of expropriation even when the expropriating State is the plaintiff.³ In all these respects the act of State doctrine has been divorced from the principle of sovereign immunity which was its original logical basis.

Almost all of the cases concern expropriation of property. In most countries courts are reluctant to question expropriations in foreign States; but there is little evidence that this reluctance is motivated by a belief that international law requires States to recognize the validity of acts of other States, and in some countries courts have made far-reaching exceptions to the general practice of recognition.

United States courts have been particularly firm in holding that they cannot question acts of foreign States. Such acts cannot be questioned on

Transport case (1963), *International Legal Materials*, 3 (1964), pp. 1030, 1044-45). Nor, according to the *Victory Transport* case, does it apply to the trading activities of the State.

¹ (1897), 168 U.S. 250, 252.

² Almost all of the cases where the act of State doctrine has been applied (apart from cases involving servants or agents of the State) fall into this category. The main exceptions are *Banco Nacional de Cuba v. Sabbatino* (1964), 376 U.S. 398 (where the State appeared as plaintiff to enforce an expropriatory decree), *American Banana Co. v. United Fruit Co.* (1909), 213 U.S. 347 (where the plaintiff alleged that the defendant had induced a foreign State to interfere with and seize the plaintiff's property) and *Occidental Petroleum Corp. v. Buttes Gas and Oil Co.* (1971), *American Journal of International Law*, 65 (1971), p. 815 (similar); see also the cases referred to below, p. 248, n. 7, and p. 249 nn. 1, 2, 4, 5.

³ (1964), 376 U.S. 398. Cf. Verzijl, *International Law in Historical Perspective* (1968), vol. 1, p. 169.

the grounds that they are contrary to the law of the State concerned¹ or (probably) that they are contrary to international law,² although the effect of the judicial decisions on this latter point has been partially reversed by Act of Congress.³ New York courts have refused to recognize foreign confiscatory decrees on the grounds that they are contrary to New York public policy,⁴ although state courts are supposed to follow Federal rules on this subject.⁵ One or two cases state that the act of State doctrine is a rule of international law (for instance, in *National Institute of Agrarian Reform v. Terry Kane* a Florida court said that to declare invalid a Cuban expropriation 'would be a denial of the sovereignty of a foreign State'),⁶ but this view was rejected by the Supreme Court in the *Sabbatino* case.⁷ Instead, the Supreme Court regarded the doctrine as based on 'constitutional underpinnings'; the executive had primary responsibility for foreign relations, and pronouncements by the judiciary might impede the efforts of the executive to reach a satisfactory settlement with the foreign State.⁸ Logically, therefore, the doctrine should not apply when the State Department requests the Court not to apply it; this exception was laid down by the Court of Appeals for the Second Circuit in *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*⁹ and approved *obiter* by the Court of Claims in *Wyman v. U.S.*,¹⁰ but disapproved by a majority of the Supreme Court in *First National City Bank v. Banco Nacional de Cuba*.¹¹

Courts outside the United States also usually recognize foreign expropriations, sometimes by relying on the act of State doctrine, sometimes by relying on ordinary rules of private international law. There is seldom any suggestion that recognition of foreign expropriations is required by public international law.

English courts usually recognize foreign expropriations.¹² The dictum in *Underhill v. Hernandez*¹³ has been quoted with approval in at least two

¹ *Columbia Law Review*, 62 (1962), pp. 1278, 1291.

² *Banco Nacional de Cuba v. Sabbatino* (1964), 376 U.S. 398, and the earlier cases mentioned *ibid.* 430-1; *Bernstein v. van Heyghen Frères* (1947), *Annual Digest*, 1947, pp. 11, 14.

³ *American Journal of International Law*, 59 (1965), p. 899.

⁴ *Vladikavkazsky Railway v. New York Trust Co.* (1934), *Annual Digest*, 1933-34, p. 65; *Plesch v. Banque Nationale de la République d'Haiti* (1948), *ibid.*, 1948, p. 13; *Sulyok v. Penzin-tezeti Kozpont Budapest* (1952), I.L.R. 19 (1952), p. 11.

⁵ *Banco Nacional de Cuba v. Sabbatino* (1964), 376 U.S. 398, 424-5.

⁶ (1963), 153 So. 2d 40. See also the dicta in *Hatch v. Baer* and *Underhill v. Hernandez*, above, pp. 244-5.

⁷ (1964), 376 U.S. 398, 421. Justice White, who dissented, agreed with the other judges on this point: *ibid.* 444. The same view was taken by the courts below, by most commentators and by the general opinion of the legal profession: see, for instance, *Restatement, . . . Foreign Relations Law of the U.S.* (1965), p. 123.

⁹ (1954), 210 F. 2d 375.

⁸ 376 U.S. 398, 423, 431-3.

¹⁰ (1958), I.L.R., vol. 26, pp. 29, 30.

¹¹ (1972), *International Legal Materials*, 11 (1972), p. 811. The Court divided 5-4; three of the majority supported the *Bernstein* exception; the four dissenting judges and one (possibly both) of the concurring judges condemned it.

¹² *Halsbury's Laws of England* (3rd ed., 1954), vol. 7, pp. 282-5.

¹³ See above, pp. 244-5.

English cases,¹ and Scrutton L.J. in *Luther v. Sagor* reasoned by analogy from the principle of sovereign immunity,² which might suggest that the act of State doctrine was required by public international law; but the approach of Bankes L.J. in *Luther v. Sagor*, which treated the question as one of private international law and not of public international law, probably represents the mainstream of English authority.³ The expropriation can be challenged on the grounds that it is contrary to English public policy⁴ if it is penal or discriminatory,⁵ but probably not if the only ground for complaint is that compensation has not been paid.⁶

Two French cases state that the act of State doctrine is a rule of public international law,⁷ but most French decisions recognizing foreign expropriations make no mention of public international law.⁸ The expropriation will be regarded as contrary to French public policy and will be denied recognition if fair compensation is not paid (or at least fixed) in advance.⁹ This, for all practical purposes, makes nonsense of the idea that recognition is required by international law, since it excludes recognition in virtually the only class of case where the former owner is likely to challenge the expropriation; the exception destroys the rule.

Confiscatory expropriations are also regarded as contrary to public policy in Switzerland.¹⁰ Most German decisions on this point take the opposite view,¹¹ but confiscations which discriminate against people because of their nationality are contrary to public policy.¹²

¹ *Luther v. Sagor*, [1921] 3 K.B. 532, 548-9, per Warrington L.J.; *Princess Olga Paley v. Weisz*, [1929] 1 K.B. 725, 728, per Scrutton and Sankey L.JJ.

² [1921] 3 K.B. 532, 555-6. This reasoning is fallacious: Lipstein, *Transactions of the Grotius Society*, 35 (1949), pp. 157, 159-60; *Banco Nacional de Cuba v. Sabbatino* (1964), 376 U.S. 398, 438; and see above, p. 245.

³ Lipstein, loc. cit. (n. 2 above), *passim*, esp. pp. 158-9. See also *Bank voor Handel en Scheepvaart N.V. v. Slatford* (1951), I.L.R. 18 (1951), p. 171; *Re Helbert Wagg*, [1956] Ch. 323.

⁴ Lipstein, loc. cit. (n. 2 on this page), p. 160. ⁵ *Re Helbert Wagg*, [1956] Ch. 323.

⁶ *Ibid.*, disapproving *Anglo-Iranian Oil Co. v. Jaffrate*, [1953] 1 W.L.R. 246. Note that the argument in the latter case was that expropriation of foreign-owned property is contrary to international law if compensation is not paid. In *Republic of Peru v. Peruvian Guano Co.* (1887), 36 Ch. D. 489, and *Republic of Peru v. Dreyfus Brothers Co.* (1888), 38 Ch. D. 348, English courts refused to give effect to the law of a new foreign government invalidating contracts made by the old government, because such laws were contrary to the rules of international law on governmental succession.

⁷ *Lafuente v. Llaguno y Duranona* (1938), *Annual Digest*, 1938-40, p. 152 (Bordeaux Court of Appeal); *Larrasquitu and the Spanish State v. Société Cementos Rezola* (1937), *ibid.*, 1935-37, p. 196 (according to the judgment at first instance; this dictum does not appear in the judgment of the Poitiers Court of Appeal).

⁸ *Restatement, Second, Foreign Relations Law of the U.S.* (1965), pp. 134-5.

⁹ Batiffol, *Droit international privé* (5th ed., 1971), vol. 2, p. 151.

¹⁰ *American Journal of Comparative Law*, 3 (1954), pp. 88-9.

¹¹ I.L.R. 18 (1951), pp. 197-201; *Journal de droit international* (1929), p. 184; and see the *Bremen Tobacco* case, below, p. 247. A different view was taken by the Superior Court of Hamburg in *Sociedad Minera el Teniente S.A. v. A.G. Norddeutsche Affinerie*, *International Legal Materials*, 12 (1973), p. 251.

¹² *Annual Digest*, 1949, p. 25; *ibid.*, 1948, p. 24; *American Journal of Comparative Law*, 3 (1954), p. 93.

Italian courts approach foreign expropriations in terms of private international law, not in terms of the act of State doctrine. The expropriation will be recognized if it is lawful under the *lex situs*, unless it is contrary to Italian public policy,¹ and it will be regarded as contrary to Italian public policy if it makes no provision for compensation.²

Austrian courts apply the act of State doctrine³ unless the act is contrary to Austrian public policy (e.g. confiscation of a discriminatory nature).⁴ There is no suggestion that recognition of the act is required by public international law.

In the *Anglo-Iranian Oil Co.* case Japanese courts said that they could not refuse recognition to nationalizations which were contrary to international law; it is uncertain whether they meant that recognition was required by international law, although they added *obiter* that they could refuse effect to laws which were contrary to Japanese public policy.⁵

Belgian courts apply the act of State doctrine,⁶ without holding that it is required by international law.⁷ But a foreign expropriation which is discriminatory and does not provide for compensation is contrary to Belgian public policy and will not be recognized.⁸

The Netherlands courts are particularly strict in upholding the act of State doctrine. A number of judgments say that it is a rule of public international law.⁹ At one time it was held that international law obliged the Netherlands courts to recognize foreign acts of State even if they were

¹ *Vaghi v. Reichsbank* (1939), *Annual Digest*, 1938-40, p. 153.

² *Journal de droit international* (1924), p. 254 (reversed on a different ground: *Adriaanse, Confiscation in Private International Law* (1956), p. 62); *Hardtmuth* case (1960), I.L.R., vol. 40, pp. 17, 20 (Court of Cassation). In *Anglo-Iranian Oil Co. Ltd. v. SUPOR* (1953), *ibid.*, vol. 22, pp. 19, 23, Italian courts were satisfied with vague promises of compensation.

³ (1922), *Annual Digest*, 1919-22, p. 56.

⁴ *Hardtmuth* case (1958), I.L.R., vol. 26, pp. 40-1.

⁵ (1953), *ibid.* 20 (1953), pp. 305, 309, 313. Japanese public policy seems to be much the same as Italian public policy; see above, n. 2 on this page.

⁶ *Propetrol* case (1939), *Annual Digest*, 1938-40, p. 25.

⁷ In the *Baufremont* case the court of first instance held that public international law required Belgian courts to recognize foreign naturalizations (*Journal de droit international* (1880), p. 215); the Brussels Court of Appeal rejected this view and reversed the decision (*ibid.*, p. 508). (In any case, questions of nationality are in a class of their own; see above, p. 217). In *Société du gaz de Nice v. De Locht-Labye (La Belgique judiciaire)* (1896), p. 955, a court of first instance held that the principle of sovereignty prevented a Belgian court from investigating whether a patent issued by France was invalid under French law. But, as a general rule, foreign patents are not recognized at all (*Dicey and Morris on the Conflict of Laws* (8th ed., 1967), pp. 929-30), and there is little difference between not recognizing a patent and holding it to be invalid. In any case how could the application of French law by a Belgian court be construed as a violation of French sovereignty?

⁸ *Kovacs* case, *Revue belge de droit international* (1970), p. 699; Brussels Court of Appeal, 14 October 1967, *Revue de droit international et de droit comparé*, 45 (1968), p. 247. See also *Revue belge de droit international*, 9 (1973), p. 658 (*Rousseau* case).

⁹ *Pétroservice S.A. and Crédit minier franco-roumain S.A. v. El Aguila* (1939), *Annual Digest*, 1919-42, p. 17; see also the cases mentioned in the next note and *Nederlands Tijdschrift voor Internationaal Recht* (1966), p. 58. *Contra*, the *Papadopoulos* case (1928), *Annual Digest*, 1927-28, p. 34.

contrary to international law,¹ although these cases have now been overruled by the *Hoge Raad*.² The Netherlands courts cannot investigate whether the act was contrary to the law of the foreign State,³ but they can refuse recognition if the act is contrary to the Netherlands public policy. In recent years the *Hoge Raad* has held that an act of expropriation is contrary to the Netherlands public policy and will be refused recognition if it discriminates against the Netherlands nationals,⁴ or if it is not accompanied by compensation.⁵ Since the original owner of the property is unlikely to challenge the expropriation if he has received compensation, the result of these exceptions is to make the act of State doctrine a dead letter, as far as the Netherlands courts are concerned.

In short, municipal judgments do not provide a clear answer to the question whether international law requires the application of the act of State doctrine in cases where the defendant is not a servant or agent of the State. The United States Supreme Court answered the question in the negative in the *Sabbatino* case; some other judgments answer the question in the affirmative, but most judgments do not deal with the question at all. Although courts do normally recognize foreign expropriations, there are exceptions. In particular, if recognition is refused (as it is in some countries) whenever fair compensation is not paid, the exception swallows up the rule, because this is virtually the only type of case where the original owner is likely to challenge the expropriation.

Doctrinal opinion does not support the view that application of the act of State doctrine is required in cases where the defendant is not a servant or agent of the State.⁶ International judicial and arbitral decisions are silent. States hardly ever⁷ protest against the non-recognition of their acts by the courts of another State. (This is worth emphasizing, because municipal judges have often based the act of State doctrine on the need not to offend foreign States;⁸ Scrutton L.J. in *Luther v. Sagor* went so far as to say that non-recognition of a foreign act of State might be a *casus belli*!⁹

¹ *Poortensdijk Ltd. v. Soviet Republic of Latvia* (1942), 11 *ibid.*, 1919-42, pp. 142, 143 (*obiter*); *Lesser v. Rotterdamsche Bank* (1953), I.L.R. 20 (1953), pp. 57, 60 (affirmed *sub nom. Kling v. Lesser* (1955), *ibid.* 22 (1955), p. 101); *Republic of the South Moluccas v. Royal Packet Shipping Company* (1951), *ibid.* 17 (1950), pp. 143, 152 (*obiter*). It is hard to believe that such a dysfunctional rule could be a rule of international law.

² *U.S.A. v Bank voor Handel en Scheepvaart* (1969), *International Legal Materials*, 9 (1970), p. 758, following *Bank Indonesia v. Senembah Maatschappij and Twentsche Bank* (1959), I.L.R., vol. 30, p. 28 (Amsterdam Court of Appeal).

³ The *Poortensdijk* case presumably still represents Netherlands law on this point.

⁴ *Indonesian Corporation P. T. Escomptobank v. N. V. Assurantie Maatschappij de Nederlanden van 1845* (1964), *Nederlands Tijdschrift voor International Recht*, 13 (1966), pp. 58, 68.

⁵ *Zeiss case* (1957), *American Journal of Comparative Law*, 7 (1958), p. 287.

⁶ I.L.A. (1962), p. xiv; Lipstein, *Transactions of the Grotius Society*, 35 (1949), p. 157; Mann, *Law Quarterly Review*, 59 (1943), p. 42.

⁷ Below, p. 250 n. 1.

⁸ e.g. *Oetjen v. Central Leather Co.* (1918), 246 U.S. 297, 303-4.

⁹ [1921] 3 K.B. 532, 559.

The truth is that States are not so sensitive on this point as judges believe.) Indeed, there is virtually¹ nothing in the practice of governments to support the view that international law requires the application of the act of State doctrine in cases where the defendant is not a servant or agent of the State.

Moreover, such a view would be unsound as a matter of principle. International law probably does not require the application of foreign laws or the recognition of foreign judgments.² Why should an act of State be treated differently? Because it 'involves the interests of a State as a State'?³ But this is an argument which cuts both ways. At one time it was believed in France that political laws, simply because they were political laws, should not be applied by foreign courts. This view has lost favour now, but only because of the difficulty of defining political laws.⁴ The fact remains that criminal and revenue laws, which involve the interests of the State to a far greater extent than rules of 'private' law do, are much less likely to be applied by foreign courts than the latter.

Since States are independent of one another, it would be a breach of international law for a court of one State to address an order to another State or to annul an act of another State.⁵ Thus, in *Buck v. Attorney-General*⁶ the English Court of Appeal dismissed an action claiming a declaration that the Constitution of Sierra Leone was void; and the French Court of Cassation has held that it would be a violation of the sovereignty of a foreign State if a French court were to annul the attachment of property situated within that foreign State when the attachment had been ordered by a court of that State.⁷ But a court which refuses to recognize a foreign expropriation does not really seek to annul the expropriation (despite unfortunate language in some cases about treating the expropriation as invalid); it merely holds, in effect, that the expropriation has no effect in the State of the forum,⁸ so that the original owner of the property can recover it when it is brought into the State of the forum.⁹

¹ The only exception appears to be a debate in the U.N.C.T.A.D. Trade and Development Board in 1972, when certain Latin American countries argued that application of the act of State doctrine was required by public international law in expropriation cases; the Board passed a resolution which might be interpreted as supporting this view. See *Journal of World Trade Law*, 7 (1973), p. 376.

² See above, Part IV, sections 2 and 3, pp. 216-40.

³ This is the definition of an act of State given by the *Restatement, Second, Foreign Relations Law of the U.S.* (1965), p. 127.

⁴ Munch, *Recueil des cours*, 98 (1959), pp. 415, 443, 450.

⁵ But a State is under a duty to rescind its acts if they are contrary to international law (*Chorzów Factory* case (1928), *P.C.I.J.*, Series A, No. 13, p. 47) and there is nothing wrong in the court of one State calling upon another State to fulfil an already existing obligation.

⁶ [1965] Ch. 745.

⁷ *Sirey* 1932. I. 137. See also *Journal de droit international* (1886), pp. 343, 348 and (1899), pp. 346, 348; but cf. *ibid.* (1890), p. 348. When an English court issues injunctions to persons concerning their conduct abroad, it often emphasizes that it is not addressing the injunction to the authorities of a foreign State (e.g. *Ellerman Lines v. Read*, [1928] 2 K.B. 144).

⁸ Similarly when a court refuses to enforce a foreign judgment: Nussbaum, *Principles of Private International Law* (1943), pp. 246-7.

⁹ This distinction, elaborated by Fedozzi, *Recueil des cours*, 27 (1929), pp. 145, 200 et seq.,

Expropriation of property owned by nationals abroad

It is lawful for a State to pass a law expropriating property owned by its nationals abroad,¹ but a State is not entitled to take possession by force of property situated in other States.² Expropriating States have therefore often tried to enforce such laws in the courts of the State of the *situs*. Such attempts have invariably failed,³ except when the government of the State of the *situs* had by implication agreed to give effect to the expropriatory legislation,⁴ or when a State had vested property in a custodian of enemy property in order to prevent assets situated in an allied State from falling under enemy control.⁵ If a State is under no duty to recognize expropriation of property situated in the expropriating State, it must *a fortiori* be under no duty to recognize expropriation of property situated on its own territory.

This question arose at the end of the Second World War, when the allied powers occupying Germany tried to persuade neutral States to surrender German-owned assets situated in neutral States. The United Kingdom told the United States that no government could claim that foreign States were obliged by international law to hand over assets of that government's nationals.⁶ Switzerland took the same approach in its negotiations with the allies.⁷ Eventually Switzerland agreed to surrender German assets to the allies, but the preamble to the agreement between Switzerland and the allies recites that 'the Swiss Government stated that it was unable to recognize the legal basis of these [allied] claims but that it desired to contribute its share to the pacification and reconstruction of Europe'.⁸ In their negotiations with Sweden the allies argued that 'under principles of comity' the State of the *situs* should allow extraterritorial effect to expropriatory legislation 'in the absence of compelling reasons of public policy to the contrary and the presence of sound reasons in the reparation concept to the affirmative'; in addition to the ambiguity of comity,⁹ this sounds more like a policy argument than a legal argument. Sweden denied that she was under any legal obligation, and the agreement finally reached between

and restated by the Court of Venice in *Anglo-Iranian Oil Co. Ltd. v. SUPOR* (1953), I.L.R. 22 (1955), p. 19, has been overlooked in most of the municipal judgments applying the act of State doctrine. See, for instance, the dicta in *Underhill v. Hernandez*, quoted above, pp. 244-5, and in *National Institute of Agrarian Reform v. Terry Kane*, quoted above, p. 246.

¹ See above, p. 180.

² See above, p. 148.

³ There are at least fifty-nine such cases reported in the *International Law Reports*.

⁴ *U.S. v. Pink* (1942), 315 U.S. 203; *Brownell v. Sun Life Assurance Co. of Canada* (1954), I.L.R. 21 (1954), p. 39.

⁵ *Lorentzen v. Lydden* (1941), *Annual Digest*, 1941-42, p. 131; *Brown, Gow, Wilson et al. v. Beleggings-Societeit N.V.* (1961), I.L.R., vol. 42, p. 409. *Contra*, *Bank voor Handel en Scheepvaart N.V. v. Slatford* (1951), *ibid.* 18 (1951), p. 171.

⁶ *Foreign Relations of the U.S.* (1945), vol. 2, pp. 905-6.

⁷ *Ibid.*, p. 911.

⁸ Cmd. 6884 (1946).

⁹ See above, pp. 214-16.

Sweden and the allies contains neither a denial nor an admission of liability.¹ The agreement with Spain recites that Spain recognizes that the allies, as occupying powers in Germany, have 'no less authority than any previous German Government with respect to German subjects and their property in Spain'²—which leaves the question open. The Austrian Supreme Court held that inter-allied agreements about German assets in Austria had no effect in Austrian law.³

Several Soviet and Czech writers argue that international law obliges (capitalist) countries to give effect to laws enacted by other (communist) countries nationalizing the property of their nationals situated in the former (capitalist) countries.⁴ But communist governments have not apparently put forward such arguments in international negotiations. Indeed, the early Soviet nationalization decrees were interpreted by many Western courts as not being intended to apply to property situated abroad.⁵ Some, at least, of the agreements concluded between communist countries concerning nationalization are based on a strictly territorial principle.⁶ If the views of the Soviet and Czech writers were correct, a United States law nationalizing all assets owned by United States nationals in Cuba would have prevented Cuba from subsequently nationalizing those assets, since Cuba would be obliged to respect the United States law; the United States could have passed such a law for the sole purpose of preventing expropriation by Cuba. Such a state of affairs would obviously be unacceptable to any communist, and would run counter to the principle of local sovereignty over natural resources,⁷ but it is the inescapable logical conclusion of the views advocated by Soviet and Czech writers; what is sauce for the goose is sauce for the gander.

Is there a duty to withhold recognition from illegal acts?

Mann argues that international law imposes a duty on States to withhold recognition from the acts of other States which infringe the rights of third States.⁸ It is true that States often do withhold recognition from the illegal

¹ Cmd. 7241 (1947). See also Mann, this *Year Book*, 24 (1947), pp. 239, 249-50; *Department of State Bulletin* (1947), vol. 17, No. 421, p. 155.

² Cmd. 7535 (1948).

³ (1952), I.L.R. 19 (1952), p. 623.

⁴ Seidl-Hohenveldern, *American Journal of Comparative Law*, 7 (1958), p. 541.

⁵ This *Year Book*, 27 (1950), p. 362; *Journal de droit international* (1952), pp. 1140-2. The Soviet declaration cited in *U.S. v. Pink* (1942), 315 U.S. 203, 219-20, indicates that Soviet law was intended to apply to assets outside the Soviet Union, but it was concerned with the dissolution of Soviet corporations rather than with the nationalization of assets held abroad by individuals of Soviet nationality; in any case, it contained no suggestion that international law obliged other States to give effect to the Soviet law.

⁶ Drucker, *International and Comparative Law Quarterly*, 10 (1961), pp. 238, 247-8, and in *Law Times*, 229 (1960), pp. 279-80, 293-4.

⁷ See above, pp. 188-9.

⁸ *Law Quarterly Review*, 70 (1954), p. 181.

acts of other States,¹ but there is very little evidence that they regard themselves as under a duty to withhold recognition.

This question is of particular relevance to expropriation. The number of cases in which a court of one State has had to deal with the illegal expropriation by another State of property belonging to a national of a third State is very small (usually the dispossessed owner is a national of the expropriating State or of the State of the forum), but in at least four cases courts have recognized such expropriations.² In the *Bremen Tobacco* case the court carefully considered a plea that it was obliged by international law to withhold recognition, and rejected it.³

In some States illegal expropriations are recognized even when the victim is a national of the State of the forum.⁴ It is hardly likely that the courts of such States would give greater protection to the nationals of third States than they give to their own nationals; in other words, it seems reasonable to predict that they would follow the *Bremen Tobacco* case.

Practice in the case of illegal seizure by a belligerent occupant is rather different. Municipal courts are much more inclined to hold that a purchaser from the belligerent occupant does not have a good title,⁵ and this applies equally in cases where the national State of the original owner or the State where the seizure occurred is not the State of the forum.⁶ There is a good deal of doctrinal support for the view that international law requires non-recognition of the occupant's title,⁷ but this view is supported by only one dictum in a municipal judgment,⁸ with other municipal decisions going the

¹ Ibid., pp. 186 et seq.

² *Propétrol and others v. Compania Mexicana de Petroleo* (1939), *Annual Digest*, 1938-40, p. 25; *Anglo-Iranian Oil Co. Ltd. v. Idemitsu Kosan Kabushiki Kaisha* (1953), I.L.R. 20 (1953), pp. 305, 309, 313; *N.V. Verenigde Deli-Maatschappij v. Deutsche Indonesische Tabak-Handels-gesellschaft* (1959), *ibid.*, vol. 28, pp. 16, 25-30 (the *Bremen Tobacco* case); *Sociedad Minera el Teniente S.A. v. A.G. Norddeutsche Affinerie*, *International Legal Materials*, 12 (1973), p. 251. One might imagine that courts would evade the issue by holding that international law merely gives a right to compensation and does not regard the actual act of expropriation as unlawful and invalid if compensation is not paid. However, municipal courts do not seem to have used this argument.

³ (1959), I.L.R., vol. 28, pp. 16, 25-30; see also the commentaries by Domke, *American Journal of International Law*, 55 (1961), pp. 585, 610-15, and Seidl-Hohenveldern, *ibid.* 56 (1962), p. 507. The *Bremen Tobacco* case was followed by the Superior Court of Hamburg in *Sociedad Minera el Teniente S.A. v. A.G. Norddeutsche Affinerie*, *International Legal Materials*, 12 (1973), p. 251.

⁴ See above, pp. 245-9.

⁵ Morgenstern, this *Year Book*, 38 (1951), pp. 291, 302 et seq.; O'Connell, *International Law* (2nd ed., 1970), vol. x, pp. 797-8.

⁶ Morgenstern, *loc. cit.* (in the preceding note), pp. 315-20; *Rosenberg v. Fischer* (1948), *Annual Digest*, 1948, p. 467; *State of the Netherlands v. Federal Reserve Bank* (1951), I.L.R. 18 (1951), p. 558; *N.V. de Bataafsche Petroleum Maatschappij v. War Damage Commission* (1956), *ibid.*, vol. 23, p. 810.

⁷ G. von Glahn, *The Occupation of Enemy Territory* (1957), pp. 193-6; Morgenstern, *loc. cit.* (n. 5 on this page); Oppenheim, *International Law* (7th ed., by H. Lauterpacht, 1952), vol. 1, p. 411; Vászárhelyi, *Restitution in International Law* (1964), pp. 114-26.

⁸ *Société de Sosnowice v. Banque de dépôts et de crédit* (1917), *Revue de droit international privé*, 14 (1918), p. 190.

other way.¹ The Inter-Allied Declaration of 5 January 1943 on acts of dispossession committed in territories under enemy occupation contains a mutual pledge by the allies to co-operate with one another in undoing acts of dispossession, but does not contain anything to indicate that it is declaratory of a duty imposed by customary international law.² The allies later claimed the return of gold which Germany had looted from occupied territories and deposited in neutral countries during the Second World War, although apparently they did not argue that the neutrals were under a legal duty to return the gold; at all events, the agreement between the allies and Switzerland recites that 'the Swiss Government . . . was unable to recognize the legal basis of these claims' but co-operated because 'it desired to contribute its share to the pacification and reconstruction of Europe'.³ Some of the decisions of the Mixed Arbitral Tribunals after the First World War held that Germany had acquired title to property which she had illegally requisitioned in occupied territories during the war; even those decisions which held otherwise tended to rely on special provisions of the Treaty of Versailles and do not support the idea that there is a general duty of non-recognition.⁴

There are also various arguments of principle, analogy and policy which deserve consideration.

As a matter of principle, Mann argues that a State which breaks international law acts *ultra vires*—the implication being that its acts must be treated as nullities by other States.⁵ This raises vast questions which cannot be dealt with fully here; suffice it to say that not all breaches of international law are *ultra vires* acts (or *vice versa*) and not all illegal acts or acts *ultra vires* are absolute nullities.⁶ It may be difficult to say whether a particular illegal act is an absolute nullity or whether it possesses some lesser degree of ineffectiveness. The international community has no centralized organs to answer this question, and in practice each State answers the question for itself by means of recognition. It may be inconvenient for States to treat as absolute nullities acts which are illegal but which they are powerless or disinclined to alter. In practice, when such inconvenience becomes intolerable, a State will recognize the act and thus cure its illegality, bringing the law into line with the facts (instead of bringing the facts into line with the law, as would happen in an ideal world). The real problem therefore is whether States are under any duty to refrain from recognizing illegal acts.

¹ *Papadopoulos case* (1925), *Annual Digest*, 1925-26, p. 27 (affirmed on another ground (1928), *ibid.*, 1927-28, p. 34); *Thirez v. Descamps* (1948), *ibid.*, 1948, p. 608; *Perrin-Jannès ès-qualités v. Masi* (1948), *American Journal of International Law*, 43 (1949), p. 820.

² Cmd. 6418.

⁴ Schwarzenberger, *The Law of Armed Conflict* (1968), pp. 279-82.

⁵ *Law Quarterly Review*, 70 (1954), pp. 181, 194.

⁶ Jennings in *Cambridge Essays in International Law* (essays in honour of Lord McNair, 1965), p. 64; cf. E. Lauterpacht, *ibid.*, p. 88.

³ Cmd. 6884, 1946.

Such a duty exists in the case of illegal situations brought about by the use of threat or force, but there is no evidence that such a duty exists in the case of other types of illegal acts.

Mann also argues that 'a judge who, in a case involving an international delinquency committed by State *A* against State *B*, applies the law of the former, may assist in the consummation of that delinquency and thus engage his own sovereign's international responsibility'.¹ The trouble with this argument is that it does not distinguish between enforcement and recognition. What Mann says might be true if State *A* sought to expropriate the property of some of its nationals as a form of racial persecution,² and if State *B* enforced *A*'s expropriatory laws against the property of *A*'s nationals situated in *B*. But when a State expropriates property situated in territory under its sovereignty or belligerent occupation, the delinquency is consummated by the seizure, not by the recognition of that seizure in the courts of other States (the same is true, *mutatis mutandis*, of most breaches of international law).

Municipal law analogies are not very apposite. In municipal law, if *A* commits an illegal act against *B*, *C* has three choices—he can help *A*, in which case he may sometimes be regarded as acting illegally; he can help *B*; or he can do nothing. But this third choice of doing nothing is not open to a judge who is asked to recognize an act by another State which is contrary to international law; he must either recognize the act or refuse recognition. Under customary law (as opposed to treaties of alliance or guarantee) there is no obligation for one State to come to the help of another which has been injured by a breach of international law. The sad fact is that States do not normally come to the help of other States in such circumstances; they do not usually resort to reprisals or even retorsion against the wrong-doer.³

Other arguments based on analogy, which might at first sight lend support to Mann's position, crumble on closer examination. This is true, for instance, of the rule that a State must pay for property stolen by private individuals if the State later takes the property from the thieves and keeps it.⁴ But a State which recognizes an illegal expropriation by another State is not in the same position as a State which fails to put right the acts of private individuals. A State is under a duty to undo the consequences of certain acts by its inhabitants which injure foreigners, because a State is under a duty to protect foreigners against such acts on the part of its inhabitants; a State is under no duty to protect foreigners against other

¹ *Law Quarterly Review*, 70 (1954), pp. 181, 193-4.

² This assumes that racial persecution is contrary to State *A*'s legal obligations in the sphere of human rights.

³ Akehurst, this *Year Book*, 44 (1970), p. 1.

⁴ *Mazzei case*, R.I.A.A., 10 (1960), p. 525.

States, and therefore under no duty to undo the consequences of acts by other States.

The rule that a pirate cannot pass a good title to property¹ is another irrelevant analogy. In the first place, even if municipal courts were consistent in holding that title remains in the original owner,² there is no evidence that this practice is accompanied by an *opinio iuris* and therefore no authority for the view that a State would break international law by departing from this practice. Secondly, an expropriating State is not in the same position as a pirate; unlike a pirate, it has a legal system which confers at least *prima facie* validity on any title which it acquires by expropriation.

On policy grounds it might be argued that sanctions in international law are weak and that States should therefore be under a duty to uphold international law in their courts, because enforcement of international law in municipal courts is often the only alternative to a breach of international law remaining unredressed. But it would be optimistic to assume that non-recognition by municipal courts will often be an effective sanction against expropriation without compensation;³ the property may remain in the expropriating State or be sold to countries which do not share the western belief that expropriation without compensation is contrary to international law.

Besides, policy considerations cut both ways. The expropriating State and the injured State are almost certain to disagree about whether the expropriation is illegal. The expropriating State may not share the western view that expropriation without compensation is illegal; even if it shares this view, it may disagree with the injured State about the valuation of the property.⁴ In these circumstances, if a court in a third State is forced to

¹ Wortley, this *Year Book*, 24 (1947), p. 258.

² Practice is not uniform; in Spanish law goods held by a pirate for 24 hours or more passed to the captor of the pirate as booty: Calvo, *Le droit international* (3rd ed., 1880), vol. 2, p. 313. See also Verzijl, *International Law in Historical Perspective* (1971), vol. 4, pp. 200-1, 259.

³ The Anglo-Iranian Oil Company's policy of suing purchasers of oil from Iran in the early 1950s had the effect of reducing Iran's oil exports from 31,217,000 metric tons in 1950 to 14,000 metric tons in 1952; even though a number of municipal courts decided against the company, the threat and expense of litigation deterred most purchasers. But at that time there was a world surplus of oil, so that importers (most of whom were in countries which followed the 'western' view of international law about expropriation) were able to meet their needs without buying oil from Iran.

⁴ Making the validity of title to property in municipal law depend on the legality of expropriation in international law causes all sorts of problems which municipal courts are ill suited to solve. Suppose that *A*'s property is expropriated and sold to *B*, and that a court in another State allows *A* to recover his property from *B* on the grounds that the expropriation was contrary to international law. Suppose, further, that, after the date of the judgment, *A*'s State waives its claim or obtains compensation, or property which was originally expropriated for an improper purpose is used for a proper purpose, or the expropriating State, which had originally discriminated against *A*, now removes the element of discrimination by extending the expropriation to all other property-owners. In all of these cases the breach of international law disappears; but what happens to the municipal judgment? If *A* is allowed to keep the benefits of the judgment, he keeps a gain

pronounce on the question whether the expropriation is contrary to international law, it cannot avoid giving offence to one of the disputing States; this not only damages the State of the forum, but may also increase tension between the disputing States, making it harder for them to negotiate a settlement of their dispute.¹ It is much better that the courts of third States should be free to recognize or not to recognize the expropriation in accordance with their own rules of the conflict of laws and public policy, instead of being forced to intervene in a quarrel between other States by pronouncing on issues of public international law. A State which is injured by a breach of international law can drop its claim if it does not wish to be involved in a quarrel with the wrongdoing State (e.g. if it is trying to conciliate the wrongdoing State in the hope of negotiating a trade treaty on favourable terms); why should third States be denied a similar freedom of action?

In conclusion, it is submitted that third States (particularly in cases of expropriation) are under no duty to withhold recognition from acts which violate international law.

for which the original justification has disappeared; if, on the other hand, he is to be forced to give the property back to *B*, no one will want to buy the property from him for fear of finding his title invalidated at a later date.

¹ *Bremen Tobacco* case (1959), I.L.R., vol. 28, pp. 16, 30. In the *Sabbatino* case (1964), 376 U.S. 398, 431-3, the Supreme Court said that the United States Government's efforts to reach a settlement with the expropriating State would probably be impeded if United States courts pronounced upon the legality of expropriation of property owned by United States nationals. Statements by United States courts about the legality of the expropriation of property owned by, say, French nationals would, following the same reasoning, probably have an equally adverse effect on the French Government's efforts to reach a settlement with the expropriating State.

INTERIM MEASURES OF PROTECTION IN CASES OF CONTESTED JURISDICTION*

By DR. M. H. MENDELSON¹

THE length of time between the institution of proceedings before the International Court of Justice and the rendering of a final judgment is to be counted in months and years, rather than days and weeks, and so the need has been felt for a remedy analogous to the common law interlocutory injunction, whereby the parties to the dispute may be enjoined *pendente lite* from acting in a manner prejudicial to the effectiveness of the judgment which may ultimately be given.² Accordingly, Article 41 of the Statute of the Court, repeating virtually verbatim the words of Article 41 of the Statute of the Permanent Court of International Justice,³ provides:

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

Until recently, Article 41 was seldom invoked. In the whole of its lifetime, the Permanent Court of International Justice indicated interim measures only twice—in the case concerning the *Denunciation of the Treaty of November 2nd 1865 between China and Belgium*⁴ and in the *Electricity Company of Sofia and Bulgaria* case⁵—refusing them on four other occasions,⁶ while in the first quarter-century of the present Court's existence, interim measures of protection were sought only twice. The United Kingdom's request for the remedy was granted in 1951 in the *Anglo-Iranian Oil Company* case (*Request for the Indication of Interim Measures Of Protection*);⁷ Iran, however, refused to comply on the grounds that the Court had no jurisdiction over the merits of the case, and the measures were in fact subsequently revoked when the Court accepted an Iranian preliminary

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² Similar—but not always equally extensive—remedies are to be found in many Civil Law systems; cf. Dumbauld, *Interim Measures of Protection in International Controversies* (1932), pp. 8–81.

³ The letter 'p', omitted by accident in the P.C.I.J. text, is inserted in the word 'preserve' in paragraph (1), and the word 'Security' before 'Council' in paragraph (2).

⁴ P.C.I.J., Ser. A, No. 8 (Order of 8 January 1927).

⁵ Ibid., Ser. A/B, No. 79 (Order of 5 December 1939).

⁶ *Chorzów Factory (Indemnities)*, P.C.I.J., Ser. A, No. 12; *Legal Status of the South-Eastern Territory of Greenland*, ibid., Ser. A/B, No. 48; *Prince von Pless*, ibid., Ser. A/B, No. 54; *Polish Agrarian Reform and the German Minority*, ibid., Ser. A/B, No. 58.

⁷ I.C.J. Reports, 1951, p. 89.

objection.¹ In 1957 Switzerland invoked Article 41 in the *Interhandel* case (*Request for the Indication of Interim Measures of Protection*), but the Court decided that there was not sufficient danger to the applicant's rights to justify acceding to the request.²

This was the last request for interim measures for fifteen years,³ but then, within the space of eleven months, five more were presented.⁴ On 17 August 1972 interim measures of protection were granted at the request of the United Kingdom and Germany respectively in their *Fisheries Jurisdiction* cases against Iceland;⁵ on 12 July 1973 the measures were continued,⁶ the Court having meanwhile decided that it had jurisdiction over the merits.⁷ On 22 June 1973, in the *Nuclear Tests* cases against France, interim measures were awarded at the request of Australia and New Zealand, the questions of jurisdiction to entertain the case and of the admissibility of the claim being reserved for a later hearing.⁸ In the case *Concerning the Trial of Pakistani Prisoners of War*, on the other hand, the Court declined to pronounce upon Pakistan's request for interim measures on the grounds that the urgency which is one of the necessary conditions for the granting of the remedy had ceased to exist in that case, the Applicant having requested a postponement of the hearing pending negotiations with India.⁹

Like Iran in the *Anglo-Iranian Oil Co.*, the defendants in the *Fisheries Jurisdiction*, *Nuclear Tests* and *Pakistani Prisoners* cases denied that the Court had jurisdiction to determine the merits, and on this ground refused to appoint an Agent or to appear at the hearing on the request for interim measures. Iceland and France subsequently failed to comply with the measures indicated by the Court, apparently for the same reason. Such conduct raises in acute form the problem to which this article is devoted: to what extent is the Court entitled to indicate interim measures of protection when its jurisdiction to determine the merits is contested?¹⁰

¹ *I.C.J. Reports*, 1952, p. 93.

² *Ibid.*, 1957, p. 105.

³ This relative desuetude is perhaps the reason why there has been no monograph published on interim measures of protection in international law since 1932. The main sources on the subject generally are Dumbauld, *op. cit.* (above, p. 259 n. 2); Guggenheim, 'Les mesures conservatoires dans la procédure arbitrale et judiciaire', *Recueil des cours*, 40 (1932-II), p. 645; and Niemeyer, *Einstweilige Verfügungen des Weltgerichtshofs* (1932).

⁴ At about the same time, an Arbitral Tribunal constituted under the auspices of the International Centre for the Settlement of Investment Disputes recommended provisional measures of protection to both parties in the *Holiday Inns S.A., Occidental Petroleum Corporation & others v. Government of Morocco* case, I.C.S.I.D., 7th *Annual Report* (1972-3), pp. 21-2. However, the proceedings of the Tribunal have not yet been made public, and until they are, further discussion of this important case would be inappropriate.

⁵ *I.C.J. Reports*, 1972, pp. 12 (*U.K. v. Iceland*) and 30 (*Federal Republic of Germany v. Iceland*).

⁶ *Ibid.*, 1973, pp. 302 (*U.K. v. Iceland*) and 313 (*Federal Republic of Germany v. Iceland*).

⁷ Judgments of 2 February 1973, *ibid.*, pp. 3 and 49 respectively.

⁸ Orders of 22 June 1973, *ibid.*, pp. 99 (*Australia v. France*) and 135 (*New Zealand v. France*).

⁹ Order of 13 July 1973, *ibid.*, p. 328. The case has now been removed from the Court's list at the request of Pakistan—I.C.J. *Communiqué* No. 73/35, 15 December 1973.

¹⁰ Another major problem relates to the binding force of the interim measures indicated.

If the request for interim measures is preceded by a determination as to the Court's jurisdiction over the merits (substantive jurisdiction), there is no problem. If the decision is that the Court is without competence, the case will be struck off its list, and there will thus be no proceedings in connection with which interim measures might be sought.¹ True, fresh proceedings could, in theory, be instituted, but it seems clear that the Court would refuse to indicate interim measures in connection with them unless some new basis for its jurisdiction were adduced. If, on the other hand, the Court has already determined that it is competent to determine the merits, there is no obstacle to the indication of provisional measures² if the other conditions for their indication are satisfied.³

The real difficulty arises if the request for interim measures is made *before* the Court has had an opportunity to decide whether it has jurisdiction as to the merits. Bearing in mind the likely incompatibility between the relatively leisurely pace of the procedure for dealing with preliminary objections and the urgency which characterizes interim measures proceedings,⁴ does the Court have to put off its decision on the request for interim measures until it has disposed of the objection to its jurisdiction, and, if not, how certain of its substantive jurisdiction should it be before it indicates interim measures? On the one hand, to delay indicating interim measures until the Court can make certain that it has jurisdiction may result in the rights of the applicant being so prejudiced that it will be unable to derive any, or any adequate, benefit from the final judgment; on the other hand, it may be unfair to the respondent and damaging to the Court's authority for the power to be exercised in connection with a dispute over which the Court is subsequently found to have no jurisdiction. To steer a course between this Scylla and Charybdis is no easy matter at the best of times, and it has not been made any easier by a widespread failure to analyse the issues thoroughly enough. Moreover, many of the pronouncements of the

To discuss this is beyond the scope of the present paper, but it is hoped to deal with it on a subsequent occasion.

¹ Rule 66(1) of the 1972 edition of the Rules of Court provides: 'A request for the indication of interim measures of protection may be filed at any time during the proceedings in the case in connection with which it is made. The request shall specify the case to which it relates. . .'. Rule 65 of the new edition of the Rules is identical to Article 61 of the 1946 edition, and this, in turn, is, for present purposes, identical with the corresponding provisions of the Rules of Court of the Permanent Court of International Justice.

² The terms 'interim measures' and 'provisional measures' are used interchangeably by the Court and in the literature.

³ Except in so far as they fall to be considered in the context of their relationship with the problem to which this article is devoted (see below, pp. 310-20), a detailed examination of these conditions is beyond the scope of our inquiry. Briefly, there must be a substantial and imminent danger of steps being taken which might prove prejudicial to the effectiveness of an ultimate decision on the merits, whether in favour of the plaintiff or of the defendant. The measures may be indicated at the request of either party, or of the Court's own motion; in practice, however, it has always been the plaintiff who has requested them.

⁴ See below, p. 309.

Court have verged on the delphic, and, in so far as any rules can be deduced from them, it will be submitted that at any rate some of them are wrong in law and in principle.

Before embarking upon an examination of the case-law and literature and attempting to weigh up the various solutions which have been proposed, it will be helpful to examine in some detail what, logically, are the degrees of probability of the Court's possessing substantive jurisdiction in any given case. This may seem an unnecessary exercise, but it will be seen in due course that much of the confusion which has surrounded this subject has been due to the failure of some judges and jurists to analyse the possibilities clearly and to draw the proper distinctions.

Cases 1 and 11 in the following list represent the extremes of the range of possibilities, and are given for the sake of completeness. The other Cases represent various points on the continuum between Cases 1 and 11 rather than a completely exhaustive formulation of the possibilities, for there can, of course, be intervening points along the line. It should also be emphasized that Cases 2 to 10, inclusive, represent possible *predictions*, at the stage of interim measures, of what the finding on jurisdiction is likely to be; *ex hypothesi*, the definitive finding comes at a later stage and can only be either positive or negative.

THE POSSIBILITIES

Case 1. Jurisdiction is absolutely certain. This can occur only if there has been a finding that jurisdiction exists prior to the request for interim measures.

Case 2. Jurisdiction is practically certain, the possibility of a negative finding being merely theoretical. For example, the pleadings and oral arguments on the merits may have closed without any objection to the Court's jurisdiction being raised, but given the power, and perhaps even the duty,¹ of the Court to consider possible defects in its jurisdiction *proprio motu*, the possibility of a negative finding on jurisdiction, though remote,² cannot be ruled out.

Case 3. Jurisdiction is highly probable: an objection³ has been raised but seems very unlikely to succeed. The *Fisheries Jurisdiction* cases (below, pp. 278–82) can perhaps be considered as an example of this, or at any rate

¹ Cf. *Anglo-Iranian Oil Co. (jurisdiction) case*, *I.C.J. Reports*, 1952, p. 93, at p. 116, per Judge McMair.

² Cf. Rosenne, *The Law and Practice of the International Court* (1965), vol. 1, pp. 467–8.

³ It is the Court's consistent practice, as exemplified in the *Anglo-Iranian*, *Fisheries Jurisdiction*, *Nuclear Tests* and *Pakistani Prisoners* cases, at any rate to take cognizance of assertions of lack of jurisdiction in communications from respondents who fail to appear before it, even if these do not, strictly speaking, amount to preliminary objections within the meaning of Article 67 of the Rules of Court. Accordingly, for present purposes there will be no need to distinguish between formal and informal objections.

of Case 4, for subsequently fourteen of the fifteen members of the Court held that it did indeed have jurisdiction.¹

Case 4. *On the summaria cognitio which the urgency of the request for interim measures necessarily involves,² a positive finding looks distinctly the more probable, but lack of jurisdiction is by no means unarguable.*

Case 5. *The arguments are fairly evenly balanced, but at this stage a positive finding seems marginally the more likely.*

Case 6. *The arguments are very evenly balanced, and it is impossible, or at any rate very difficult, to form a definite view without extensive further argument about jurisdiction.*

Case 7. *The arguments are fairly evenly balanced, but at this stage a negative finding seems marginally the more likely.*

Case 8. *On a summaria cognitio a negative finding looks distinctly the more probable, but the contrary is by no means unarguable.*

Case 9. *A negative finding seems highly probable: title of jurisdiction has been adduced, but seems very unlikely to prove adequate.*

Case 10. *A negative finding is practically certain, the possibility of a positive finding being merely theoretical.* For example, an identically composed Court may very recently have decided that it had no jurisdiction over a dispute whose facts are in all material particulars identical to those of the case in connection with which interim measures are now sought. Until the actual determination of the Court in the second case, a positive finding is, in view of Article 59 of the Statute,³ theoretically possible, but improbable in the extreme.

Case 11. *There is definitely no jurisdiction.* Before the Court meets to consider the request for interim measures, it upholds a preliminary objection to its jurisdiction. The case should then be struck off the Court's list, and there will no longer be any proceedings in connection with which the request for interim measures could be entertained. Another possible example is where, a unilateral application having been made to the Court without any pretence of there being a title of jurisdiction, but simply and avowedly in the hope that the respondent will submit to the Court's jurisdiction and thereby confer competence on it by *forum prorogatum*,⁴ the respondent unequivocally indicates its refusal to confer jurisdiction on the Court.⁵

These cases are listed in descending order of acceptability, in two senses.

¹ *I.C.J. Reports*, 1973, pp. 3, 49 respectively. See also below, pp. 281-2.

² *Case Concerning the Polish Agrarian Reform and the German Minority (Interim Measures of Protection)*, *P.C.I.J.*, Ser. A/B, No. 58, at p. 181 (per Judge Anzilotti).

³ 'The decision of the Court has no binding force except between the parties and in respect of that particular case.'

⁴ Cf. Rosenne, *op. cit.* (above, p. 262 n. 2), pp. 344-63.

⁵ For other, slightly different scenarios involving the doctrine of *forum prorogatum*, see below, pp. 301 and 304.

First, the lower down the list one goes, the smaller the number one finds of judges or writers who would be prepared to indicate interim measures. Secondly, a judge who would be prepared to indicate interim measures in, say, Case 6, would *a fortiori* be prepared to indicate them in Cases 1 to 5, other things being equal.

THE CASE-LAW

(a) *The Mixed Arbitral Tribunals*

Important precedents are to be found in the decisions of the Mixed Arbitral Tribunals which were constituted pursuant to the peace treaties of 1919 and 1920 to settle claims between allied governments or nationals and defeated governments or nationals. The Tribunals had the power to adopt their own rules of procedure, and of the thirty-four sets of rules published, only those of the Anglo-German, Japanese-German and Japanese-Australian Tribunals did not expressly authorize interim measures to be ordered.¹

In its decision in *Leo von Tiedemann v. Polish State* of 21 May 1923, the German-Polish Mixed Arbitral Tribunal stated, in connection with a preliminary objection to its jurisdiction:

Sans trancher la question, le Tribunal estime qu'en presence du texte de l'art. 305 et de la loi polonaise, il y a une présomption de compétence assez forte pour qu'il ne s'arrête pas aujourd'hui à l'exception d'incompétence. Il sera mieux renseigné lors de l'examen du fond, sur la caractère du Comité de liquidation et de ses décisions et il aura pu étudier à loisir l'art. 305.²

And in its decision of 4 March 1925 in *Frauenverein Szamothly v. Polish State*, the same Tribunal, referring to possible doubts as to its jurisdiction over the merits, observed:

Attendu que ces questions font l'objet même du procès et que, à propos de la demande de mesures conservatoires, le Tribunal estime ne devoir les préjuger ni dans un sens ni dans un autre;

Attendu qu'il lui suffit de constater que la solution négative de ces questions ne s'impose avec une telle évidence qu'il serait d'ores et déjà certain que les conclusions de la requête ne pourront pas être admises et que, d'autre part, pour le cas où lesdites questions devraient recevoir une solution affirmative, il y a un intérêt très considérable à ce que l'Etat défendeur ne se dessaisisse pas du bien soumis à la liquidation;³

and went on to grant the measures requested. The Tribunal seems, then, to have adopted a liberal view of its powers, and to have been willing to grant interim measures even when its possession of jurisdiction seemed unlikely, though still arguable.

¹ Cf. Dumbauld, *op. cit.* (above, p. 259 n. 2), pp. 129-31; Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), p. 268 n. 27. Even the failure to make express provision did not necessarily prevent interim measures from being ordered, as the *Gramophone Co.* case (below, p. 308 n. 2) demonstrates.

² *T.A.M.*, vol. 3, p. 596 at p. 607.

³ *Ibid.*, vol. 6, p. 326 at p. 327.

The attitude of the Roumano-Hungarian Mixed Arbitral Tribunal appears to have been rather similar, for its decision of 4 July 1925 in *Ungarische Erdgas A.G. v. Roumanian State* the Order granting interim measures includes the following recitals:

Attendu, quant à l'irrecevabilité soulevée par le défendeur, que les éléments soumis à l'appréciation du Tribunal ne démontrant pas péremptoirement le défaut de qualité pour la société demanderesse à introduire la présente action; que dans le doute et vu le caractère urgent de la présente demande, le Tribunal, sans se prononcer actuellement sur le mérite de ce moyen de défense, estime qu'il y a lieu, momentanément, de passer outre à cette exception;

Attendu que, s'agissant en l'espèce seulement d'une demande tendant à l'obtention de mesures conservatoires, le Tribunal ne saurait, sans préjuger le fond de l'affaire, se prononcer sur la question de savoir si, comme prétend le gouvernement roumain, la société demanderesse est soumise à un contrôle allemand et non pas à un contrôle hongrois; qu'en effet, ainsi qu'en convient le défendeur lui-même, le Tribunal ne pourra valablement examiner ce moyen de défense qu'au moment où il sera appelé à statuer sur le fond même du litige . . .¹.

In *Count Hadik Barcochy v. Czechoslovakian State*, the President of the Hungarian-Czech Mixed Arbitral Tribunal had, on 17 March 1927, issued a temporary order of interim protection. The Czech Government refused to comply on the grounds that the Tribunal had no jurisdiction and that, by reason of the danger of revolution, the public interest permitted no delay in the execution of the agrarian reform in question. When the Tribunal met again on 31 January 1928 it rejected the Czech claims, and in a much-quoted passage observed:

Au vu de l'article 33 du Règlement de Procédure, il n'est pas du tout douteux pour le Tribunal qu'il aurait le pouvoir de prendre des mesures conservatoires qu'il reconnaîtrait équitables et nécessaires, lors même que sa compétence pour statuer sur le fond de la cause est contestée et l'objet d'une procédure écrite entre les parties. L'article 33 permet au Tribunal d'ordonner des mesures conservatoires même avant le dépôt de la requête principale, donc même avant que le Tribunal soit en mesure de déterminer avec certitude s'il serait compétent. Il suffit que son incompétence ne soit pas manifeste, évidente. Il est clair que dans ce cas le Tribunal ne pourrait entrer en matière; mais dans l'espèce le Tribunal est saisi d'une demande émanant de personnes possédant la nationalité hongroise (le fait n'est pas contesté) et basée sur l'article 250 du Traité de Trianon, dans lequel la compétence du Tribunal est expressément prévue.

L'Etat défendeur prétend que cet article n'est point applicable en l'espèce; les demandeurs, au contraire, répondent qu'ils sont en bon droit pour l'invoquer. *La question est ouverte*, et le Tribunal peut aborder l'examen de la demande de mesures conservatoires, sans préjuger la question de compétence, en gardant au contraire toute sa liberté pour se prononcer sur ce point, lorsque l'instruction de la demande sera terminée et après clôture des débats. Il peut et doit réserver l'égalité des parties sur ce point. Or refuser de prendre des mesures conservatoires pour le seul motif qu'une demande exceptionnelle d'incompétence a été déposée, serait ouvrir une voie bien simple

¹ Ibid., vol. 5, p. 951 at p. 954.

a toute partie qui voudrait éviter qu'il soit pris contre elle des mesures conservatoires, et ce serait rendre absolument illusoire la faculté assurée au Tribunal par l'article 33 de son Règlement. Il suffirait à la partie défenderesse, qui se sentirait gênée, d'introduire une exception d'incompétence pour empêcher ainsi le Tribunal d'assurer pendant la durée du procès la conservation de l'objet du litige ou d'une façon générale l'égalité des parties en cours du procès.

Ainsi le Tribunal peut et doit, dans l'espèce, s'abstenir avec soin, en vérifiant la légitimité d'une demande de mesures conservatoires, d'entrer dans l'examen des moyens invoqués par les parties pour ou contre sa compétence au fond.

Il suffit, comme le lui prescrit son règlement, qu'il examine si les mesures conservatoires qui sont requises, sont *équitables et nécessaires*. Cependant le Tribunal ne peut s'empêcher de constater qu'il a le devoir d'être doublement prudent dans cet examen, alors qu'il sait, d'une part, que l'exception d'incompétence est soulevée, et alors que la décision du Tribunal accordant les mesures conservatoires requises peut avoir une répercussion sur toute une série de cas analogues.¹

At precisely which point on our list of probabilities the lack of jurisdiction becomes 'manifest or evident' is not entirely clear, but certainly Cases 1 to 7, and most probably Case 8, would not fall within this category.

As we shall see, this dictum had a considerable influence on the *Anglo-Iranian Oil Company* case, being quoted in argument by Sir Frank Soskice for the United Kingdom,² and echoed in the majority judgment.³ However, the relevance and authority of this and the other decisions quoted above must not be exaggerated. As the Hungarian-Czech Tribunal itself recognized, the Rules of Procedure of the Mixed Arbitral Tribunals authorized requests for interim measures to be made *before* the institution of the principal proceedings, in other words, before the Tribunal was in possession of adequate information regarding the jurisdictional basis of the main claim. If the measures could be ordered even in these circumstances, they could *a fortiori* be ordered when a title of jurisdiction had been adduced but was contested. The same reasoning does not apply in the case of the Court, however, for according to Rule 66 (1) of the Rules of Court, it would seem that a request for interim measures cannot be filed before the main proceedings are instituted.⁴

(b) *The Permanent Court of International Justice*

The first application to the Permanent Court for the indication of interim measures was in the case concerning the *Denunciation of the Treaty of November 2nd, 1865 between China and Belgium* (1927).⁵ The request for

¹ *Revue général du droit international public*, 35 (1928), p. 61, at pp. 65-6.

² *Anglo-Iranian Oil Co. case*, I.C.J. Pleadings (1952), p. 401, at pp. 409 et seq.

³ See below, p. 270.

⁴ In the *South Eastern Greenland* case, the Permanent Court stated that it is 'in principle arguable' that the power to indicate interim measures is confined to cases already submitted to the Court, but went no further into the question after deciding that the request had been regularly submitted; *P.C.I.J.*, Ser. A/B, No. 48, pp. 283-4.

⁵ *Ibid.*, Ser. A, No. 8.

interim measures was in fact contained in the application instituting proceedings, and, under the Rules of Court then in force, was dealt with by the President of the Court before the question of jurisdiction over the merits was settled, and even before the time for lodging preliminary objections had elapsed. Recognizing that the parties had accepted the jurisdiction of the Court by means of Optional Clause declarations which were capable of covering the dispute 'if the Treaty of November 2nd 1865 were recognized as still operative', the President (Huber) indicated interim measures 'provisionally, pending the final decision of the Court in the case . . . by which decision the Court will either declare itself to have no jurisdiction or give judgment on the merits . . .'.¹ The Order was subsequently revoked on the application of Belgium in pursuance of an agreement with China,² and the entire case was eventually withdrawn without any jurisdictional issue's having been raised or determined.³ In the circumstances, the case is authority only for the propositions that interim measures can be indicated in the absence of any objection to, or self-evident defect in, the Court's jurisdiction, and that such indication does not prejudice the question of jurisdiction.

When the request for interim measures was made in the *Chorzów Factory (Indemnities)* case (1929),⁴ the Court had already determined that it had jurisdiction over the merits.⁵ Accordingly the question with which we are concerned here did not arise.

It did, however, arise in regard to the request for interim measures made by Norway in the case concerning the *Legal Status of the South Eastern Territory of Greenland* (1932).⁶ Although the Court had not yet definitely decided that it had jurisdiction over the merits, it held that it was competent to consider whether circumstances warranted the indication of interim measures,⁷ though in the end it accepted Denmark's contention that they did not. Jurisdiction over the merits was never in fact contested,⁸ and the case was ultimately withdrawn.⁹

In the case concerning the *Administration of the Prince von Pless (Interim Measures of Protection)* (1933),¹⁰ the request for interim measures was made after Poland had raised a preliminary objection as to the admissibility of the German claim, and this objection had been joined to the merits. In the event, however, the Polish Government notified the Court that certain of the measures complained of had been due to an administrative error and

¹ Ibid., at p. 7 (Order of 8 January 1927).

² Ibid., at p. 9 (Order of 15 February 1927).

³ Ibid., Ser. A, Nos. 18/19 (Order of 25 May 1929).

⁵ Judgment of 26 July 1927, *ibid.*, Ser. A, No. 9.

⁷ Ibid., at p. 284.

⁸ Indeed, Denmark had herself applied to the Court for a declaratory judgment on the same issue.

⁹ *P.C.I.J.*, Ser. A/B, No. 55.

⁴ Ibid., Ser. A, No. 12.

⁶ Ibid., Ser. A/B, No. 48.

¹⁰ Ibid., Ser. A/B, No. 54.

had now been annulled, and that it would suspend the other coercive measures in respect of the income-tax of the Prince von Pless pending the final decision of the Permanent Court. The German Government stated that this solution would be satisfactory. Accordingly, the Court decided that the request for interim measures 'has ceased to have any object, and . . . it is accordingly unnecessary for the Court to consider whether it would have been competent to adjudicate upon it and whether [the] Application was admissible', noting further that 'the present Order must in no way prejudice either the question of the Court's jurisdiction to adjudicate upon the German Government's Application . . . or that of the admissibility of that Application'.¹

Some two months later, the Court dismissed the German request for interim measures in the case concerning the *Polish Agrarian Reform and the German Minority*² on the ground that it was not in conformity with Article 41 of the Statute, since the measures requested went further than the rights claimed in the principal proceedings, referring to future, rather than past, expropriations. The Court reached this conclusion

. . . without having to consider the scope of Article 12 of the . . . Treaty [of Versailles], as regards the indication of interim measures of protection, and irrespective of the question whether it may be expedient for the Court in other cases to exercise its power to act *proprio motu*, and without in any way prejudging the German Government's Application instituting proceedings or the admissibility of that Application.³

The dissenting opinions in the case concerned the interpretation of the German request and the desirability of satisfying it, rather than the question of jurisdiction; and in fact no objection to jurisdiction was made before the action was discontinued.⁴

When the first request for interim measures in the *Electricity Company of Sofia and Bulgaria* case was submitted by Belgium, on 4 July 1938, the Court's jurisdiction over the merits had not yet been established, and, indeed, Bulgaria had not yet raised her objection to the jurisdiction. The request was, however, withdrawn shortly afterwards, before Bulgaria had even had time to comment on it. By the time the second request under Article 41 of the Statute was made, on 17 October 1939, the Court had already adjudicated upon, and rejected, the defendant's preliminary objection, and so the issue with which we are concerned here did not arise.⁵

In short, the Permanent Court never found it necessary to consider whether it should indicate interim measures in the face of an objection to its jurisdiction, and never gave any real guidance on the question.

¹ *P.C.I.J.*, Ser. A/B, No. 54, at p. 153.

² *Ibid.*, Ser. A/B, No. 58.

³ *Ibid.*, at pp. 178-9.

⁴ *Ibid.*, Ser. A/B, No. 60, at p. 33.

⁵ *Ibid.*, Ser. A/B, No. 79.

(c) The International Court of Justice

Its successor, on the other hand, was squarely confronted with the issue—or at any rate a similar one—when it received the first request for interim measures made to it, in the *Anglo-Iranian Oil Co. (Interim Measures)* case.¹ The defendant, Iran, had, like the United Kingdom, made a declaration under the Optional Clause accepting the compulsory jurisdiction of the Court, but declined to appoint an Agent or to appear at the hearing. However, in a communication of 29 June 1951 the Iranian Foreign Minister opposed the request for interim measures, principally on the ground of the want of competence on the part of the United Kingdom to refer to the Court a dispute which had arisen between Iran and a private company, and of the fact that the dispute was exclusively within the domestic jurisdiction of Iran. The message went on:

In view of the foregoing considerations the Iranian Government hopes that the Court will declare that the case is not within its jurisdiction because of the legal incompetence of the complainant and because of the fact that exercise of the right of sovereignty is not subject to complaint. Under these circumstances the request for interim measures would naturally be rejected.²

Sir Frank Soskice, Attorney-General, did not deal with these particular objections in his oral argument,³ but he did discuss at length the power of the Court to indicate interim measures before it had determined that it had substantive jurisdiction.⁴ In the first place, he relied on the principle adopted by the Mixed Arbitral Tribunals, and particularly by the Hungarian-Czech Tribunal in the *Count Hadik Barcoczy* case,⁵ that interim measures may be indicated if the Tribunal is not manifestly without competence to determine the merits, and that such indication does not pre-judge the question of competence.⁶ He also relied on the following passage from Dumbauld's book on interim measures:

Another important principle emphasized in the jurisprudence of the Mixed Arbitral Tribunals is that in order to grant interim measures it is not necessary to decide whether the tribunal has jurisdiction in the main proceedings on its merits, but it suffices that *prima facie* there is a possibility of a decision in favour of the plaintiff and that the tribunal's lack of jurisdiction is not manifest.⁷

¹ *I.C.J. Reports*, 1951, p. 89.

² *Ibid.*, at p. 92.

³ *Anglo-Iranian Oil Co. case, I.C.J. Pleadings*, p. 401. It is understood that the late Sir Hersch Lauterpacht played a part in the drafting of this argument. The same approach was subsequently adopted, with refinements, by Sir Hersch in his judicial capacity; see below, pp. 276–8.

⁴ It is necessary to consider the oral argument in this and the subsequent cases in some detail, for two reasons. First, it is often only by studying the arguments of Counsel that one can understand the point of certain judicial pronouncements. Secondly, in contrast to the laconic, not to say delphic, dicta of the Court, a substantial part of the oral argument in the cases which we shall be considering was addressed to the question with which this article is concerned, and raises some of the most important issues.

⁵ Above, p. 265.

⁶ At pp. 409–10.

⁷ Dumbauld, *op. cit.* (above, p. 259 n. 2), p. 144. Cf. also *ibid.*, at p. 165.

As has been seen,¹ this would seem to be a fair summary of the practice of those Tribunals.

Sir Frank also quoted the following passage from Niemeyer's book:

This [i.e. the view that a decision on jurisdiction is required before making an order for interim protection] would necessitate an exhaustive examination of the case; it would make necessary an examination of the evidence. In brief, the exact situation would arise which must be avoided: a protracted argument which would waste time, which would deprive the provisional measures both of their true character and of their urgency, and which would prejudice the eventual outcome of the final decision which is in no way connected with the object of provisional measures. A provisional order given in that way would achieve only a negligible degree of its intended effectiveness. It is, therefore, clear that, for reasons of practical convenience, there is no room for an examination of the question of jurisdiction on the merits in connection with a request for interim protection.²

Sir Frank stated that this passage expresses the same view as that of Dumbauld, but it is respectfully submitted that it does not. For, if Niemeyer's words are taken literally, there is no room at all for the examination of the question of jurisdiction, and interim measures can therefore be granted in virtually all cases, other circumstances permitting.

In contrast to Sir Frank Soskice's lengthy and learned disquisition, the Order of the Court indicating interim measures of protection is brief and lays down no clear guidelines on the jurisdictional issue. After referring to the two grounds of incompetence asserted in the Iranian communication of 29 June 1951,³ the recitals continue:

Whereas it appears from the Application by which the Government of the United Kingdom instituted proceedings, that that Government has adopted the cause of a British company and is proceeding in virtue of the right of diplomatic protection;

Whereas the complaint made in the Application is one of an alleged violation of international law by the breach of the agreement for a concession of April 29th, 1933, and by a denial of justice which, according to the Government of the United Kingdom, would follow from the refusal of the Iranian Government to accept arbitration in accordance with that agreement, and whereas it cannot be accepted *a priori* that a claim based on such a complaint falls completely outside the scope of international jurisdiction;

Whereas the considerations stated in the preceding paragraph suffice to empower the Court to entertain the Request for interim measures of protection;

Whereas the indication of such measures in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case and leaves unaffected the right of the Respondent to submit arguments against such jurisdiction . . .⁴

The words 'and whereas it cannot be accepted *a priori* that a claim based on such a complaint falls completely outside the scope of international

¹ Above, pp. 264-6.

² Niemeyer, *op. cit.* (above, p. 260 n. 3), p. 70 (Sir Frank's translation).

³ Above, p. 269.

⁴ *I.C.J. Reports*, 1951, p. 89, at pp. 92-3.

jurisdiction' have subsequently been invoked as authority for the proposition that the Court may grant interim measures unless it appears *prima facie* that the case is outside the Court's jurisdiction.¹ However, this may be to confuse two distinct concepts. It is submitted that a case can be described as *a priori* outside the Court's jurisdiction only if, by virtue of some well-established principle to the undisputed facts, the contrary is virtually unarguable—for example, if the matter is clearly within the 'reserved domain'. On the other hand, to say that interim measures should be withheld if it appears *prima facie* that the case is outside the Court's jurisdiction may—depending on how the term is used—be taken as meaning that the test is whether, on a preliminary examination, the case seems *on balance* to be outside the Court's jurisdiction; more cases would be excluded by this test than by the former. This is one example of the way in which the use of ambiguous terminology can cause confusion.

Moreover, although the last paragraph of the passage cited above does indicate that the Court considered itself able to indicate interim measures in advance of a final determination that it had jurisdiction, the preceding three paragraphs are not, strictly speaking, concerned with the jurisdictional issue at all. Although the Iranian communication concluded by asking the Court to declare that the case was 'outside its jurisdiction', the objections which Iran raised were less concerned with jurisdiction than with admissibility and the merits. One of these objections was, as we have seen, that the expropriation of a foreign company was entirely within Iran's domestic jurisdiction, and thus by definition could not be the subject of international adjudication; and it was to meet this objection that the Court observed that a claim based on an alleged breach of the 'minimum standard of international law' in the treatment of a foreign national, coupled with a denial of justice, cannot be regarded *a priori* as falling completely outside the scope of international jurisdiction. This was plainly right, as was its terse dismissal, in the preceding paragraph, of the other Iranian objection that a Government cannot, as a matter of principle, bring before the Court a claim based on a wrong done to its national as opposed to itself.² But at this stage in the proceedings, no objection to jurisdiction, properly so-called—such as the one based on the wording of the Iranian declaration accepting the Optional Clause, which subsequently persuaded the Court to dismiss the claim³—had yet been raised.

This being so, the decision of the Court in this case is authority for less than has commonly been supposed. It decides that the Court is not prevented from indicating interim measures merely because it has not yet

¹ Cf., e.g., below, p. 279.

² Cf. Lauterpacht, *The Development of International Law by the International Court* (1958), p. 255, n. 42.

³ *I.C.J. Reports*, 1952, p. 93.

decided on its jurisdiction, and it also decides that objections to the admissibility of the claim which seem very unlikely to succeed are no impediment either. Contrary to what has subsequently been suggested,¹ it is *not* authority for (or against) the proposition that interim measures should only be withheld if the Court seems *a priori* or manifestly without jurisdiction to proceed to the merits.

For the two members of the Court who appended a joint dissenting opinion, this was the key question: how far should the Court go in indicating interim measures when its substantive jurisdiction was uncertain?² Judges Winiarski and Badawi Pasha conceded that 'it could not be claimed that, in the event of a challenge of its jurisdiction, the Court should finally pronounce on this question before indicating interim measures of protection; in such a case as this the request might well become pointless'. However, in their view, the Court, before indicating interim measures, 'must consider its competence reasonably probable'.

The question of interim measures of protection is linked, for the Court, with the question of jurisdiction; the Court has power to indicate such measures only if it holds, should it be only provisionally, that it is competent to hear the case on its merits. Article 41 of the Statute empowers the Court to indicate interim measures of protection 'if it considers that circumstances so require'. The provisions of this Article presuppose the competence of the Court; this Article is to be found in the Chapter of the Statute headed 'Procedure'; it refers to 'the parties': there must therefore be proceedings within the meaning of the Statute and there must be parties.

Even in municipal law, they observed, the exceptional character of the remedy meant that 'in cases where the measures asked for would involve particular hardship on the respondent, a judge will only grant it if the right of the applicant appears to him to be clear; thus too, if it seems to him to be very probable that the applicant will fail in the proceedings, he will refuse to grant the relief asked for'. But in municipal law, the tribunal from whom the remedy was sought, or *some* tribunal, would always have jurisdiction. It is otherwise in international law.

In international law it is the consent of the parties which confers jurisdiction on the Court; the Court has jurisdiction only in so far as that jurisdiction has been accepted by the parties. The power given to the Court by Article 41 is not unconditional; it is given for the purposes of the proceedings and is limited to those proceedings. If there is no jurisdiction as to the merits, there can be no jurisdiction to indicate interim measures of protection. Measures of this kind in international law are exceptional in character to an even greater extent than they are in municipal law; they may easily be considered a scarcely tolerable interference in the affairs of a sovereign State. For this reason, too, the Court ought not to indicate interim measures of protection unless its competence, in the event of this being challenged, appears to the Court to be nevertheless reasonably probable. Its opinion on this point should be reached after a summary

¹ See, for example, below, p. 279.

² *I.C.J. Reports*, 1951, pp. 96-8.

consideration; it can only be provisional and cannot prejudge its final decision, after the detailed consideration to which the Court will proceed in the course of adjudicating on the question in conformity with all the Rules laid down for its procedure.

We find it difficult to accept the view that if *prima facie* the total lack of jurisdiction of the Court is not patent, that is, if there is a possibility, however remote, that the Court may be competent, then it may indicate interim measures of protection. This approach, which also involves an element of judgment, and which does not reserve to any greater extent the right of the Court to give a final decision as to its jurisdiction, appears however to be based on a presumption in favour of the competence of the Court which is not in consonance with the principles of international law. In order to accord with these principles, the position should be reversed; if there exist weighty arguments in favour of the challenged jurisdiction, the Court may indicate interim measures of protection; if there exist serious doubts or weighty arguments against this jurisdiction such measures cannot be indicated.

There are certainly cases in which the objection to the jurisdiction is regarded as a mere ground of defence, and in which the party overruled in its objection continues to take part in the proceedings. But in this case the facts are quite different. Iran affirms that it has not accepted the jurisdiction of the Court in the present matter and that it is in no way bound in law; it has refused to appear before the Court and has put forward reasons for its attitude. The Court ought therefore to decide, in a summary way and provisionally, for the purpose of arriving at the decision which it must take on the question of interim measures of protection, which is the more probable of the two conclusions which it may finally come to on the question of its jurisdiction.

Applying these criteria, and having formed the provisional view (for reasons unstated) that 'the Court will at the time of its final decision be compelled to hold itself without jurisdiction in this case', the two Judges came to the conclusion that interim measures should not have been indicated.

The present author's own submissions on the proper test to apply will be made in due course,¹ but for the moment we are concerned with establishing for what propositions of law the various judicial pronouncements are authority. In this context, the following observations may be made on the joint dissenting opinion:

- (i) The two Judges seem to attribute to the Court—though not in so many words—'the view that if *prima facie* the total lack of jurisdiction of the Court is not patent, that is, if there is a possibility, however remote, that the Court may be competent, then it may indicate interim measures of protection'. As we have seen, there is nothing in the decision of the Court which would justify the attribution to it of such a view.²
- (ii) The tests propounded are not completely consistent. In two of the passages quoted, the dissenting Judges required jurisdiction to be 'reasonably probable' before interim measures could be indicated,

¹ Below, pp. 315–20.

² Cf. Lauterpacht, *op. cit.* (above, p. 271 n. 2), p. 110 n. 64.

and in another expressed the view that the Court was obliged to make a provisional determination of 'which is the more probable of the two conclusions which it may finally come to on the question of its jurisdiction'. This would seem to permit provisional measures of protection to be indicated so long as the balance of probabilities is in favour of the Court having jurisdiction. On the other hand, in yet another passage, the two Judges observed that 'if there exist serious doubts or weighty arguments against this jurisdiction, such measures cannot be indicated': this test would seem to be stricter, prohibiting the granting of such measures except where the objection to jurisdiction is virtually unarguable.

The next occasion on which the question arose was in connection with the Swiss request for interim measures in the *Interhandel* (*Interim Measures*) case (1957).¹ Although both parties had made declarations under the Optional Clause, that of the United States included a reservation excluding from the jurisdiction of the Court 'disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America', and the United States invoked this reservation in a preliminary objection to the Court's jurisdiction over the part of the dispute which was covered by the request for interim measures. According to the American Co-Agents, the effect of this was to preclude the Court from indicating provisional measures; indeed, they argued that once the United States had determined that the matter was one of domestic jurisdiction, the Court was precluded from making its own evaluation of the extent of its competence.² Professor Guggenheim, the Swiss Co-Agent, challenged the validity of the construction which the United States sought to put upon its Optional Clause declaration, but agreed that the Court would not wish, in its examination of the request for interim measures, to enter into 'so complex and delicate a question'.³ For the time being, he contended, the Court could not be said to be manifestly without competence; indeed, he suggested that until the Court ruled on the effect of the American reservation, it had jurisdiction.

In the meantime, however, as the result of certain developments in the United States, the danger of the shares in dispute being sold before the final judgment of the Court receded; and in these circumstances the Court decided that there was no need to indicate interim measures. Unlike the position it subsequently adopted in the *Pakistani Prisoners* case,⁴ the Court did not consider that this absolved it from dealing with the jurisdictional issue, though it can hardly be said to have made its position particularly clear. The recitals to the Order, after referring to the invocation of the

¹ *I.C.J. Reports*, 1957, p. 105.

² *Interhandel* case, *I.C.J. Pleadings*, pp. 452-8.

³ *Ibid.*, at pp. 462-3.

⁴ Below, pp. 301-2.

United States reservation and the Swiss challenge to this reservation, continue:¹

Whereas the procedure applicable to requests for the indication of interim measures of protection is dealt with in the Rules of Court by provisions which are laid down in Article 61 and which appear, along with other procedures, in the section entitled: 'Occasional Rules';

Whereas the examination of the contention of the Government of the United States requires the application of a different procedure, the procedure laid down in Article 62 of the Rules of Court, and whereas, if this contention is maintained, it will fall to be dealt with by the Court in due course in accordance with that procedure;

Whereas the request for the indication of interim measures of protection must accordingly be examined in conformity with the procedure laid down in Article 61;

Whereas, finally, the decision given under this procedure in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case and leaves unaffected the right of the Respondent to submit arguments against such jurisdiction. . .

By drawing this distinction between the two procedures, the Court was indicating quite firmly that the *mere fact* of raising an objection to its jurisdiction would not be enough to prevent it from indicating interim measures. If it had been willing to maintain this distinction in all circumstances, this would mean that the Court would have been prepared to indicate interim measures even in the face of a compelling objection with every prospect of success. This is not a necessary inference from the words used, however; strictly speaking, they are authority only for the proposition that a query about competence does not *ipso facto* rule out the indication of provisional measures. More can be inferred about the test actually applied by the Court by considering the circumstances of the case. Bearing in mind the extensive discussion of the validity and effect of reservations of the American type which had taken place in the Court a few months earlier in the *Norwegian Loans* case,² and which was to recur in the subsequent proceedings in the *Interhandel* case,³ it may not be unreasonable to conclude that the Court agreed with the Swiss Co-Agent that the question of its jurisdiction was too 'complex and delicate' to be properly dealt with at the interim measures stage, and that, until the question could be properly examined, the arguments for and against its jurisdiction would have to be regarded as more or less equally possible. If this inference is correct, it means that the majority of the members of the Court were prepared to grant interim measures at any rate where the balance of probabilities did not seem to be against their having jurisdiction.⁴

¹ *I.C.J. Reports*, 1957, p. 105, at p. 111.

² *Ibid.*, p. 9.

³ *Ibid.*, 1959, p. 6.

⁴ As Shihata (*The Power of the International Court to Determine its own Jurisdiction* (1965), p. 179) observes, it is interesting to note that Vice-President Badawi Pasha and Judge Winiarski, who dissented on the jurisdictional issue in the *Anglo-Iranian* case, formed part of the majority in this case.

Judge Kojevnikov stated his disagreement with the Order, but without saying why. Five other judges, however, explained their disagreement with the majority on the jurisdictional issue (though they concurred in the result).

Judge Wellington Koo simply declared that the United States had the power to determine that the case was outside the Court's jurisdiction; that this power extended to the interim measures procedure; and that, by virtue of its exercise, the Court was not competent in the matter.¹ Unlike the dissenting Judges in the *Anglo-Iranian* case,² he did not even qualify his determination as provisional. This tells us nothing of the correct test to be applied when the Court does not find the question so clear-cut.

Judge Klaestad, with whom President Hackworth and Judge Read concurred, felt that he was not, for the moment, called upon to determine the validity of the American reservation.³ In the *Norwegian Loans* case,⁴ neither party had contested the validity of a similar reservation, and the Court had accordingly decided to give effect to it. Similarly, in the present case the Swiss Co-Agent had not expressly contested the validity of the American reservation, and so effect should be given to it, albeit only provisionally, and without prejudice to the question of the jurisdiction of the Court to deal with the merits. This opinion says nothing of what the Court should do if there is a real disagreement between the parties as to its competence.

In his important Separate Opinion, Judge Sir Hersch Lauterpacht came to the conclusion that the Court ought not to indicate interim measures.⁵ In making its final determination as to its jurisdiction over the merits, the Court could reach one of three possible conclusions:

- (i) It could hold that the American reservation was so inconsistent with a true acceptance of the compulsory jurisdiction of the Court that the entire Declaration of Acceptance under the Optional Clause was a nullity, in which case the Court would be without jurisdiction. This was the view which he had himself taken in the *Norwegian Loans* case.⁶
- (ii) It could uphold the validity of the Declaration and of the 'automatic reservation', in which case the Court would again be without jurisdiction.
- (iii) It could declare the reservation to be invalid, but uphold the Declaration, in which case it would (provided other preliminary objections failed) have jurisdiction.

The learned Judge considered that possibility (iii) 'was sufficiently remote to permit its exclusion as a factor in the *prima facie* appreciation of the possibility of the Court's jurisdiction on the merits'. And in any case,

¹ *I.C.J. Reports*, 1957, p. 105, at pp. 113-14.

³ *I.C.J. Reports*, 1957, p. 105, at pp. 115-16.

⁵ *Ibid.*, p. 105, at pp. 117-20.

² Above, pp. 272-3.

⁴ *Ibid.*, p. 9.

⁶ *Ibid.*, p. 9, at p. 42

the American reservation would have to be deemed valid until such time as it might be invalidated by the Court. In other words, Judge Lauterpacht came to the conclusion that the American reservation would have to be treated as valid at least until the final decision on jurisdiction, and that the chances of the Court' being able to find that it had jurisdiction at that stage were so remote that they should be ignored. It is important to bear this fact in mind when considering the following, much-quoted, passage from his opinion:¹

In deciding whether it is competent to assume jurisdiction with regard to a request made under Article 41 of the Statute the Court need not satisfy itself—either *proprio motu* or in response to a Preliminary Objection—that it is competent with regard to the merits of the dispute. The Court has stated on a number of occasions that an Order indicating, or refusing to indicate, interim measures of protection is independent of the affirmation of its jurisdiction on the merits and that it does not prejudge the question of the Court's jurisdiction on the merits (case concerning the *Polish Agrarian Reform and the German Minority*, Series A/B, No. 58, p. 178; *Anglo-Iranian Oil Company* case, *I.C.J. Reports*, 1951, p. 93). Any contrary rule would not be in accordance with the nature of the request for measures of interim protection and the factor of urgency inherent in the procedure under Article 41 of the Statute. However, it is one thing to say that action of the Court under Article 41 of the Statute does not in any way prejudge the question of its competence on the merits and that the Court need not at that stage satisfy itself that it has jurisdiction on the merits or even that its jurisdiction is probable; it is another thing to affirm that the Court can act under Article 41 without any regard to the prospects of its jurisdiction on the merits and that the latter question does not arise at all in connection with a request for interim measures of protection. Governments which are Parties to the Statute or which have undertaken in some form or other commitments relating to the obligatory jurisdiction of the Court have the right to expect that the Court will not act under Article 41 in cases in which absence of jurisdiction on the merits is manifest. Governments ought not to be discouraged from undertaking, or continuing to undertake, the obligations of judicial settlement as the result of any justifiable apprehension that by accepting them they may become exposed to the embarrassment, vexation and loss, possibly following upon interim measures, in cases in which there is no reasonable possibility, *prima facie* ascertained by the Court, of jurisdiction on the merits. Accordingly, the Court cannot, in relation to a request for indication of interim measures, disregard altogether the question of its competence on the merits. The correct principle which emerges from these apparently conflicting considerations and which has been uniformly adopted in international arbitral and judicial practice is as follows: The Court may properly act under the terms of Article 41 provided that there is in existence an instrument such as a Declaration of Acceptance of the Optional Clause, emanating from the Parties to the dispute, which *prima facie* confers jurisdiction upon the Court and which incorporates no reservations obviously excluding its jurisdiction. These conditions do not exist in the case now before the Court.

The negative test espoused in this passage is that the Court ought not to indicate interim measures when absence of jurisdiction on the merits is

¹ Ibid., p. 105, at p. 118.

manifest, which the learned Judge interpreted as meaning 'when there is no reasonable possibility, *prima facie* ascertained by the Court, of jurisdiction on the merits'. Bearing in mind his view that it was extremely unlikely that the Court had jurisdiction over the merits of the case before him, the application of this test led him to vote against the indication of such measures. However, Sir Hersch also formulated a positive test for future reference, as it were: 'The Court *may* properly act under the terms of Article 41 provided that there is in existence an instrument such as a Declaration of Acceptance of the Optional Clause, emanating from the Parties to the dispute, which *prima facie* confers jurisdiction upon the Court and which incorporates no reservations obviously excluding its jurisdiction.' This is a clear indication that Sir Hersch would have been prepared to grant interim measures in Cases 1 to 8 in our list. It is consistent with the pronouncements of the Mixed Arbitral Tribunals on the subject, and with his own reading of the case-law of the World Court.¹

It would appear, then, that Judge Lauterpacht took a fairly liberal view of the power of the Court to indicate interim measures. If he disagreed with the majority in the case before him, it was not necessarily because he subscribed to a stricter general test (as has been seen,² it is difficult to be sure what the Court's test was, but it may indeed have been stricter than Sir Hersch's); it was rather because he took a very pessimistic view of the prospects of ultimately establishing jurisdiction in the particular case before him.

The Lauterpacht test is a relatively objective one, in the sense that it depends for the most part on the finding of obvious facts, rather than on the legal appreciation of the force of objections to jurisdiction. Basically, the Court has jurisdiction if there exists an instrument (he does not say 'a *valid* instrument' or 'one in force') emanating from the parties which seems to cover the case. He has to qualify this test to some extent in order to avoid the absurdity of the Court indicating interim measures in a case where the objection is virtually certain of succeeding because a reservation obviously excludes the Court's jurisdiction; but even here, he strives to keep the test as objective as possible by admitting the qualification only in 'obvious' cases. The application of the formula is almost mechanical and would not normally demand lengthy and detailed consideration of the Court's jurisdiction at the interim measures stage.

The next occasion on which the Court was called upon to consider the relationship between its jurisdiction over the merits and its power under Article 41 of the Statute was in the *Fisheries Jurisdiction, Interim Protection*

¹ Lauterpacht, *op. cit.* (above, p. 271 n. 2), pp. 110-12, 254-5. See especially pp. 112 n. 64 and 255 n. 41 for his view of the *ratio decidendi* in the *Anglo-Iranian* case.

² Above, p. 275.

cases.¹ For present purposes, the two cases can be regarded as raising identical issues, and it will be convenient to confine ourselves to the one which was decided first, namely, the case of *The United Kingdom v. Iceland*.

The dispute concerned the validity of the Respondent's claim to extend its exclusive fisheries jurisdiction to a zone of 50 nautical miles around Iceland, the Applicant founding the jurisdiction of the Court on Article 36 (1) of the Statute² and on an Exchange of Notes dated 11 March 1961 which contained a compromissory clause in the following terms:

The Icelandic Government will continue to work for the implementation of the Althing Resolution of May 5, 1959, regarding the extension of fisheries jurisdiction around Iceland, but shall give to the United Kingdom Government six months' notice of such extension, and, in case of a dispute in relation to such extension, the matter shall, at the request of either party, be referred to the International Court of Justice.

On 19 July 1972 the British Government requested the Court to indicate interim measures of protection. Iceland refused to appoint an Agent or to appear, and in a letter dated 29 May 1972 her Foreign Minister asserted that the agreement constituted by the Exchange of Notes was not of a permanent nature, that its object and purpose had been fully achieved, and that it was no longer applicable and had terminated; accordingly, the Court had no jurisdiction. In a telegram of 28 July 1972 the Minister repeated these assertions, and went on to object specifically to the indication of interim measures when no basis for jurisdiction was established.³

At the Oral Hearing the British Attorney-General, Sir Peter Rawlinson, sought to counter this objection.⁴ After citing the many authorities which establish that the power to indicate interim measures is not wholly dependent on competence with regard to the merits, he went on to identify 'three views on the capacity of the Court . . . to order interim measures before confirming its jurisdiction to deal with the merits'.

The first, and possibly the widest, view is that of the Court itself, as expressed in the *Anglo-Iranian Oil Company* case. And according to this view it appears to be sufficient for the appellant to show that *a priori* his claim does not fall 'outside the scope of international jurisdiction'.

This statement was of course made in the context of that particular case, but it clearly shows that, in considering a request for the indication of interim measures of protection, the Court does not require the applicant to do more than show that *prima facie* there are reasonable grounds for believing that the Court possesses jurisdiction to deal with the merits. This I submit must be right in principle.

¹ *I.C.J. Reports*, 1972, p. 12 (*U.K. v. Iceland*); *ibid.*, p. 30 (*Federal Republic of Germany v. Iceland*).

² 'The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided in the Charter of the United Nations or in treaties or conventions in force.'

³ *I.C.J. Reports*, 1972, p. 12, at p. 14.

⁴ Verbatim Record of the Public Sitting of 1 August 1972, I.C.J. Doc. C.R. 72/10, pp. 24-33.

With respect, it must be observed that, for reasons already stated,¹ the majority decision in the *Anglo-Iranian* case is not authority for the formulation proffered by Sir Peter. Moreover, even if the Court in that case had, as he suggests, required the applicant to show that '*prima facie* there are reasonable grounds for believing that the Court possesses jurisdiction to deal with the merits', this is not necessarily the widest test. On one interpretation of these words—and the one apparently put upon them by Sir Peter—the Court may indicate interim measures in any case where it is *arguable* that it has competence. Another construction of these words, however, would permit the Court to indicate the measures only if jurisdiction is *reasonably likely*, whereas other tests, such as that of the Mixed Arbitral Tribunals, are more liberal. So, too, is the test formulated by Sir Hersch Lauterpacht in the *Interhandel* case,² which was cited by Sir Peter Rawlinson as a second, and narrower, view of the powers of the Court.

The third possible view was that expressed by Judges Winiarski and Badawi in the *Anglo-Iranian* case, where they said that 'the Court ought not to indicate interim measures of protection unless its competence, in the event of this being challenged, appears to the Court to be nevertheless reasonably probable'.³ In Sir Peter's submission, that was wrong in principle.

For that view would necessarily involve the Court in judging the question of its jurisdiction without having heard proper argument, and it could have a serious prejudicial effect on the applicant's position if he were denied interim relief on the ground that the Court, on a purely summary view, had come to the conclusion that it would probably hold later on that it was not entitled to exercise jurisdiction.

It was, however, his further contention that, on the facts of the present case, even this rigorous test was satisfied, as were, *a fortiori*, the two others. By fourteen votes to one, the Court decided to indicate interim measures. In dealing with the jurisdictional issue, the recitals observe:

15. Whereas on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to act under Article 41 of the Statute if the absence of jurisdiction is manifest;

16. Whereas the penultimate paragraph of the Exchange of Notes between the Governments of Iceland and of the United Kingdom dated 11 March 1961 reads as follows:

'The Icelandic Government will continue to work for the implementation of the Althing Resolution of May 5, 1959, regarding the extension of fisheries jurisdiction around Iceland, but shall give to the United Kingdom Government six months' notice of such extension and, in case of a dispute in relation to such extension, the

¹ Above, pp. 271-2.

² Above, pp. 276-8.

³ *I.C.J. Reports*, 1951, p. 89, at p. 97.

matter shall, at the request of either party, be referred to the International Court of Justice';

17. Whereas the above-cited provision in an instrument emanating from both Parties to the dispute appears, *prima facie*, to afford a possible basis on which the jurisdiction of the Court might be founded;

19. Whereas the contention of the Government of Iceland, in its letter of 29 May 1972, that the above-quoted clause contained in the Exchange of Notes of 11 March 1961 has been terminated, will fall to be examined by the Court in due course;

20. Whereas the decision given in the course of the present proceedings in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the merits themselves and leaves unaffected the right of the Respondent to submit arguments against such jurisdiction or in respect of such merits . . .¹.

Paragraph 15 of the decision should not be read in isolation, because it does not provide a complete test. Rather, it defines the extremes. On the one hand, 'the Court need not . . . finally satisfy itself that it has jurisdiction on the merits' before undertaking interim measures, while on the other hand it 'ought not to act under Article 41 . . . if the absence of jurisdiction on the merits is manifest'. No firm indication is given here as to whether the Court would be prepared to grant provisional measures in *all* cases lying between these two extremes. This indication is found in paragraph 17, where the Court, referring to the compromissory clause relied on by the United Kingdom, observes that 'the above-cited provision in an instrument emanating from both Parties to the dispute appears, *prima facie*, to afford a possible basis on which the jurisdiction of the Court might be founded'. This is reminiscent of the positive test applied by Sir Hersch Lauterpacht in the *Interhandel* case², where he said: 'The Court may properly act under the terms of Article 41 provided that there is in existence an instrument such as a Declaration of Acceptance of the Optional Clause, emanating from the parties to the dispute, which *prima facie* confers jurisdiction upon the Court and which incorporates no reservations obviously excluding its jurisdiction'. The failure of the Court to use exactly the same terms can probably be explained by the fact that, in the instant case, it was faced with an application under paragraph 1, not 2, of Article 36 of the Statute. If the Court did indeed intend to adopt his test, it was thereby intimating that it was prepared to indicate interim measures in *all* cases not excluded by its negative test.

The suggestion may also be ventured that the Court would probably have indicated interim measures in the *Fisheries Jurisdiction* cases even if it had adopted a stricter test. The Icelandic objections never looked very plausible, and indeed, when the Court did finally determine the question

¹ Ibid., 1972, p. 12, at pp. 15-16.

² Above, pp. 277-8.

of its competence, it had little difficulty in determining, by fourteen votes to one, that it was competent to deal with the merits.¹ Such an inference would also be supported by a later observation of Judge Gros,² who, seeking to distinguish the decisions on interim measures in the *Fisheries Jurisdiction* cases, observed that at the time of those decisions 'The Court had developed an awareness of its own jurisdiction'.³ Accordingly, interim measures might well have been indicated even if the Court had adhered to the strict test formulated by Judges Winiarski and Badawi in the *Anglo-Iranian Oil Co.* case.⁴ The relevance of this speculation is that, if our inference is correct, the test applied by the Court to the facts was wider than was strictly necessary to decide the case. In so far as precedents of the International Court are authoritative at all in subsequent cases,⁵ the decision on interim measures in the *Fisheries Jurisdiction* cases is, strictly speaking, authority only for the proposition that interim measures may be indicated in Cases 1, 2, 3, and perhaps 4, of our list. To the extent that the Court went further than this, its dicta are *obiter*.⁶

Only one member of the Court differed from the reasoning or conclusion of the Court in the *Fisheries Jurisdiction* cases—Judge Padilla Nervo.⁷ He adopted the test formulated by Judges Winiarski and Badawi in the *Anglo-Iranian* case, and, having decided that there were 'serious doubts or weighty arguments against [the Court's] jurisdiction' in the cases before him, voted against the indication of interim measures. He subsequently dissented from the Court's final determination that it had jurisdiction.⁸

Although it might have seemed that the ruling of the Court in the *Fisheries Jurisdiction* cases had settled, once and for all, the question as to the circumstances in which interim measures ought to be indicated in advance of a final decision on jurisdiction, it was made clear very shortly afterwards, in the *Nuclear Tests* cases brought against France by Australia and New Zealand respectively,⁹ that the matter remained highly controversial. These two cases are identical in most relevant respects, and so,

¹ *I.C.J. Reports*, 1973, pp. 3 (*U.K. v. Iceland*) and 49 (*Federal Republic of Germany v. Iceland*).

² The learned Judge was a member of the Court when it decided the *Fisheries Jurisdiction* cases.

³ *I.C.J. Reports*, 1973, p. 99, at p. 122. The original French text is even stronger: 'La cour s'était rendu compte de l'existence de sa propre compétence.'

⁴ Above, pp. 272-4.

⁵ Article 38 (1) of the Statute provides:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

...
(d) subject to the provisions of Article 59, judicial decisions . . . as subsidiary means for the determination of rules of law.

For Article 59, see above, p. 263 n. 3.

⁶ Cf. Cross, *Precedent in English Law* (2nd ed., 1968), Chap. II.

⁷ *I.C.J. Reports*, 1972, pp. 20-8.

⁸ *Ibid.*, 1973, p. 3, at pp. 37-47.

⁹ *Ibid.*, pp. 99 (*Australia v. France*) and 135 (*New Zealand v. France*).

except where the differences are material, it will be convenient to confine our examination to the case which was decided first, namely, that instituted by Australia.

Essentially, the proceedings instituted by Australia on 9 May 1973 questioned the legality of the carrying out by France of further atmospheric nuclear weapons tests in the South Pacific. On the same day, Australia requested the Court to indicate, under Article 41 of the Statute,¹ that France 'should desist from any further atmospheric nuclear tests pending the judgment of the Court in this case'. Australia based the jurisdiction of the Court on Article 17 of the General Act for the Settlement of International Disputes, done at Geneva on 26 September 1928,² to which both States had become parties, read in conjunction with Articles 36 (1)³ and 37⁴ of the Statute of the Court; alternatively, she contended, the Court had jurisdiction by virtue of the declarations which both parties had deposited under the Optional Clause. France took the position that the case was manifestly outside the jurisdiction of the Court, and refused to appoint an Agent or to appear. Nevertheless, in a letter dated 16 May 1973, she set out at length her grounds for contesting the Court's jurisdiction and its power to indicate interim measures. These contentions were summarized by the Court as follows:

The French Government considers, *inter alia*, that the General Act of 1928 was an integral part of the League of Nations system and, since the demise of the League of Nations, has lost its effectivity and fallen into desuetude; that this view of the matter is confirmed by the conduct of States in regard to the General Act of 1928 since the collapse of the League of Nations; that, in consequence, the General Act cannot serve as a basis for the competence of the Court to deliberate on the Application of Australia with respect to French nuclear tests; that in any event the General Act of 1928 is not now applicable in the relations between France and Australia and cannot prevail over the will clearly and more recently expressed in the declaration of 20 May 1966 made by the French Government under Article 36, paragraph 2, of the Statute of the Court; that paragraph 3 of that declaration excepts from the French Government's acceptance of compulsory jurisdiction 'disputes concerning activities connected with national defence'; and that the present dispute concerning French nuclear tests in the Pacific incontestably falls within the exception contained in that paragraph . . .⁵

¹ Australia also based her request for interim measures on Article 33 of the General Act of 1928. However, this makes no difference to the present part of the discussion, and can be left aside for the moment. For further discussion, see below, p. 286.

² 'All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal'; *L.N. Treaty Series*, vol. 93, p. 345.

³ Above, p. 279 n. 2.

⁴ 'Whenever a treaty or convention in force provides for reference of a matter . . . to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.'

⁵ *I.C.J. Reports*, 1973, p. 99, at pp. 101-2.

In the face of such strong objections Australia could hardly argue that the Court's jurisdiction was self-evident and beyond question, and did not seek to do so. Instead, Mr. Ellicott, the Solicitor-General of Australia, relied on the test which, he submitted, had been expressly stated for the first time by the Court in the *Fisheries Jurisdiction* case.¹ Quoting the words 'whereas on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to act under Article 41 of the Statute if the absence of jurisdiction on the merits is manifest', he went on to say:

The Court elaborated upon this condition by saying subsequently that the relevant instrument in that case appeared '*prima facie* to afford a possible basis on which the jurisdiction of the Court might be defined',² which of course is another way, with respect, of saying the same thing, i.e. the absence of jurisdiction on the merits is not manifest.³

In his submission, this was the correct test to apply, both because 'it is natural that the Court should adhere to a formula and a standard crystallized, stated and applied less than 12 months ago', and because it was right in principle. To apply a stricter test 'would obscure the line between the process of indicating provisional measures of protection and the more substantial task of determining whether the Court actually possesses jurisdiction', a distinction which the Court had firmly insisted upon in the *Anglo-Iranian Oil Co.*, *Interhandel*, and *Fisheries Jurisdiction* cases. The distinction was also consistent with the requirements of practice.

The procedure prescribed in the Rules of the Court does not contemplate the development of extended and possibly complex argument on the question of jurisdiction. Thus there is nothing in paragraph 1 of Article 66 which requires the applicant State, when formulating its request, to develop its case on jurisdiction in any detail. The applicant is directed only to specify the case to which the request relates, the rights to be protected and the provisional measures of which the indication is proposed. The request is the only written pleading involved in provisional measures proceedings. The proceedings are identified in paragraph 2 of Article 66 as 'a matter of urgency'. It would therefore be inappropriate for the applicant to enter into a detailed argument on jurisdiction. Correspondingly, it would be inappropriate for the respondent State to raise in its oral reply fundamental issues of jurisdiction which could affect the whole course of the case and which would, were the established rule not what it is, call for immediate response.

Having identified and justified the relevant test, Mr. Ellicott then went on to seek to show that there was no manifest absence of jurisdiction over his Government's application. While urging that 'it would be inappropriate

¹ Verbatim Record of the Public Sitting held on 22 May 1973, I.C.J. Doc. C.R. 73/4, pp. 15-17.

² The word actually used by the Court was 'founded'.

³ With respect to Mr. Ellicott, this was, in context, more than 'another way of saying the same thing' (see above, p. 281). But be that as it may, our own analysis has shown that the general interpretation he sought to put upon the Court's words was broadly correct.

for the applicant to enter into a detailed argument on jurisdiction', he proceeded to spend the next two hours or so on that very question, which illustrates how difficult it is in practice to avoid detailed consideration of jurisdiction in provisional measures proceedings. The Court summarized his principal points as follows:

That various matters, including certain statements of the French Government, provide indications which should lead the Court to conclude that the General Act of 1928 is still in force between the parties to that Act; that the General Act furnishes a basis for the Court's jurisdiction in the present dispute which is altogether independent of the acceptances of compulsory jurisdiction by Australia and by France under Article 36, paragraph 2, of the Statute; that France's obligations under the General Act with respect to the acceptance of the Court's jurisdiction cannot be considered as having been modified by any subsequent declaration made by her unilaterally under Article 36, paragraph 2 of the Statute; that if the reservation in paragraph 3 of the French declaration of 20 May 1966 relating to 'disputes concerning activities connected with national defence' is to be regarded as one having an objective content, it is questionable whether nuclear weapon development falls within the concept of national defence; that if this reservation is to be regarded as a self-judging reservation, it is invalid, and in consequence France is bound by the terms of that declaration unqualified by the reservation in question¹. . . ¹.

New Zealand's submissions were basically similar, but there were certain differences of emphasis. In the first place, relying on the *Interhandel* case, her Agent and Counsel, Mr. Quentin-Baxter, went so far as to submit that, at the present stage of the proceedings, the Court ought not even to take into consideration the possible effect of the French reservation.² (If this were indeed the correct approach, the Court could and should indicate interim measures even where there are strong *prima facie* grounds for believing that the reservation would be effective in excluding the Court's jurisdiction; in other words, even in Case 9 in our list of probabilities. Since the majority of the Court in *Interhandel* seems not to have regarded the reservation in *Interhandel* as coming within this category,³ it may be respectfully submitted that the case is not authority for the New Zealand contention). Should the Court reject his contention, Mr. Quentin-Baxter went on, it ought nevertheless to decide that it was not manifestly without jurisdiction, for two reasons.⁴ (i) 'The United States reservation in *Interhandel* was wider in scope than the French reservation in the instant case; if the Court did not consider it appropriate to investigate the significance of the former, it would have less occasion to do so in the present proceedings. (ii) Secondly, he submitted, 'the validity, interpretation and effect in the present situation of the French reservation are issues which, as the Court well knows, can be the subject of debate; it cannot, we submit, be baldly

¹ *I.C.J. Reports*, 1973, p. 99 at p. 102.

² Verbatim Record of the Public Sitting held on 25 May 1973, I.C.J. Doc. C.R. 73/7, p. 11.

³ See above, pp. 274-5.

⁴ I.C.J. Doc. C.R. 73/7, p. 13.

asserted that there is a manifest absence of jurisdiction under Article 36, paragraph 2, of the Statute'. So far as the General Act was concerned, not only was there no manifest lack of jurisdiction to deal with this matter, but the Court's jurisdiction on that basis was reasonably probable, and there existed weighty arguments in its favour, so that even on the strict test propounded by Judges Winiarski and Badawi in the *Anglo-Iranian Oil Co.* case,¹ it would be proper for interim measures to be indicated.²

In addition to Article 41 of the Statute of the Court, both Australia and New Zealand sought to base the Court's power to indicate interim measures on Article 33 (1) of the General Act of 1928, which provides:

In all cases where a dispute forms the object of . . . judicial proceedings, and particularly if the question on which the parties differ arises out of acts already committed or on the point of being committed, the Permanent Court of International Justice, acting in accordance with Article 41 of its Statute, . . . shall lay down within the shortest possible time the provisional measures to be adopted. The parties to the dispute shall be bound to accept such measures.

The difficulty about this argument is, of course, that whereas there could be no doubt as to the present validity of Article 41 of the Statute, the validity of the General Act itself was very much in issue. Australia's reliance on Article 33 of the General Act was only subsidiary;³ for New Zealand it was the preferred basis of the Court's power to indicate interim measures, Article 41 of the Statute being pleaded only in the alternative.⁴ In the event, however, the Court decided

. . . that it should not exercise its power to indicate provisional measures under Article 33 of the General Act of 1928 until it has reached a final conclusion that the General Act is still in force; . . . the Court is not in a position to reach a final conclusion on this point at the present stage of the proceedings, and will therefore examine the request for the indication of interim measures only in the context of Article 41 of the Statute.⁵

Acting exclusively on the basis of Article 41 of its Statute, then, the Court stated the criteria which it would apply, as follows:

13. Whereas on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, and yet ought not to indicate such measures unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded . . . ⁶.

After summarizing the arguments of both parties on the question of jurisdiction on the merits, the Court went on:

¹ Above, pp. 272-4.

³ *I.C.J. Reports*, 1973, p. 99 at pp. 102-3.

⁵ *Ibid.*; cf. the slightly differently worded passage *ibid.*, p. 99 at p. 103.

⁶ *Ibid.*, at p. 101.

² I.C.J. Doc. C.R. 73/7, p. 35.

⁴ *Ibid.*, p. 135 at p. 139.

17. Whereas the material submitted to the Court leads it to the conclusion, at the present stage of the proceedings, that the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded . . . the Court will accordingly proceed to examine the Applicant's request for the indication of interim measures of protection . . . ¹.

The wording of paragraph 13 is not identical with the wording of the corresponding paragraph in the *Fisheries Jurisdiction* case.² The words 'Whereas on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case' are the same. However, paragraph 15 of the earlier Order went on: 'yet it ought not to act under Article 41 of the Statute *if the absence of jurisdiction is manifest*', whereas the later Order substitutes for the words in italics 'unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded'. This may be a distinction without a difference, particularly when it is borne in mind that in both cases the Court went on to find that the titles of jurisdiction invoked 'appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded'. Nevertheless, it is perhaps unfortunate that the formula used in paragraph 15 of the *Fisheries Jurisdiction* Order was not retained. As has been shown, the words 'yet it ought not to act . . . if the absence of jurisdiction is manifest' laid down a relatively clear negative test as to when the Court ought to refrain from indicating interim measures. By contrast, the words 'and yet ought not to indicate such measures unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded' are more vague. Does 'a basis on which the jurisdiction of the Court *might* be founded' mean 'might even *conceivably* be founded'; 'might reasonably *arguably* be founded'; or 'might reasonably *be expected* to be founded'? It has already been suggested that in the *Fisheries Jurisdiction* cases the formula was used as the positive complement of the 'manifest absence of jurisdiction' test: if so, it would exclude the possibility of interim measures in Cases 9 to 11 in our list, but permit them in the remaining Cases.³ It is submitted that the Court probably intended to apply the same criterion here. Nevertheless, it must be respectfully observed that, by abandoning express reliance on the 'manifest absence of jurisdiction test' in favour of a more ambiguous formula, the Court has somewhat muddled the pool of its jurisprudence, just as it was becoming clear.

If spelling a clear test out of the words of the Court is difficult, deducing the *ratio decidendi* is, at this stage particularly, well-nigh impossible. Until the pleadings and the Court's final decision on jurisdiction are published, estimating what view the Court took as to its prospects of jurisdiction over

¹ Ibid., at p. 102.

² Above, p. 280.

³ Above, p. 281.

the merits must be a matter of pure conjecture. Perhaps rashly, the present writer proffers his own guess that the majority of the Court would have regarded the Applicants' prospects of succeeding on the Optional Clause declarations as relatively poor, but the General Act point as sufficiently evenly balanced to make it impossible, or very difficult, to form a definite view—even provisionally—without extensive further argument. If the interpretation which has just been put upon the majority's words, and the conjecture which has been ventured about their views, are both correct, it comes to this. The criterion espoused by the Court would prohibit the indication of interim measures where it is manifestly without jurisdiction but permit it in other cases; however, on the facts the case is, strictly speaking, authority only for the proposition that interim measures may be indicated in cases where the arguments against competence do not appear, *prima facie*, to be the stronger.

Before turning to the views of the individual Judges who took a different view of the jurisdictional issue, it is necessary to consider one further aspect of the majority decision. Having decided that, despite the French objections, the titles of jurisdiction adduced by the Applicants were sufficient to permit it to 'proceed to examine the . . . request for the indication of interim measures', the Court now found another hurdle in its path. Observing that 'the power of the Court to indicate interim measures . . . has as its object to preserve the respective rights of the Parties pending the decision of the Court . . .', it went on: '21. Whereas it follows that the Court in the present case cannot exercise its power to indicate interim measures of protection unless the rights claimed in the Application, *prima facie*, appear to fall within the Court's jurisdiction . . .'¹ The point is, that since Article 41 is designed to preserve 'the respective rights of the parties', interim measures should not be indicated where there is no possibility of a finding in favour of the Applicant on the merits, for example because what is claimed is not a right known to international law, or because the Applicant has no legal interest in the claim. The Court apparently regarded French objections along these lines as going to the admissibility of the claim.

Outlining the respective claims of the two Applicants (which, broadly speaking, amount to allegations that the proposed nuclear weapon tests would constitute an actionable nuisance and unlawful interference with the freedom of the high seas), the Court came to the conclusion that there was no impediment to its exercising its powers under Article 41 on this score, for ' . . . it cannot be assumed *a priori* that such claims fall completely outside the purview of the Court's jurisdiction, or that the [Applicant] may not be able to establish a legal interest in respect of these claims entitling

¹ *I.C.J. Reports*, 1973, p. 99 at p. 103.

the Court to admit the Application . . . ¹. By repeating the words used in dismissing the two Iranian objections in the *Anglo-Iranian Oil Co.* case,² the Court was reiterating its view that, if it is even arguable that the facts alleged by the Applicant would, if proved, amount to a breach of international law, interim measures should not be withheld merely because the point has been, or may be, put in question. To do so could prejudice the merits to some extent, and would put in jeopardy rights which might ultimately be found to have existed. The use of the phrase '*a priori*', as opposed to '*prima facie*', may be significant. It perhaps suggests that, whatever may be the correct procedure with regard to *jurisdictional* objections, where the objection is to the legal character of the claim, no more than the most cursory preliminary consideration is appropriate at the interim measures stage, and that the mere possibility of the application's succeeding on the merits is sufficient to justify the indication of such measures in appropriate circumstances.³

The Court went on to decide, by eight votes to six, to indicate interim measures. Three of the Judges who voted with the majority, however, made declarations in which they expressed their own views as to the proper relationship between the Court's jurisdiction, the admissibility of claims and the indication of interim measures. Judge Jiménez de Aréchaga considered that:

A request should not be granted if it is clear, even on a *prima facie* appreciation, that there is no possible basis on which the Court could be competent as to the merits. The question of jurisdiction is therefore one, and perhaps the most important, among all relevant circumstances to be taken into account by a Member of the Court when voting in favour of or against a request for interim measures.

On the other hand, in view of the urgent character of the decision on provisional measures, it is obvious that the Court cannot make its answer dependent on a previous collective determination by means of a judgment of the question on its merits.

This situation places upon each Member of the Court the duty to make, at this stage, an appreciation of whether—in the light of the grounds invoked and of the other materials before him—the Court will possess jurisdiction to entertain the merits of the dispute. From a subjective point of view, such an appreciation or estimation cannot be fairly described as a mere preliminary or even cursory examination of the jurisdictional issue: on the contrary, one must be satisfied that this basic question of the Court's jurisdiction has received the fullest possible attention which one is able to give to it within the limits of time and of materials available for the purpose.⁴

Although the first of these paragraphs suggests at first sight that the learned Judge was applying the same test as the majority, the third paragraph suggests that he was not, but was prepared to grant interim measures only if, after examination in some depth, he was satisfied that the balance of

¹ Ibid., and p. 135 at pp. 139–40.

² Above, pp. 270–2.

³ For the present writer's own views on this point, see below, pp. 315–18.

⁴ *I.C.J. Reports*, 1973, p. 99 at p. 107.

probabilities was in favour of the Court's having jurisdiction over the merits.

Judge Jiménez de Aréchaga also differed from the Court in regarding the issue of whether the Applicants had a legal right of their own, or had suffered or were threatened by real damage, as linked with jurisdiction rather than admissibility, on the ground that Article 17 of the General Act refers to 'disputes with regard to which the parties are in conflict as to their respective rights'. However, bearing in mind that among the disputes to which Article 17 referred was one concerning 'the existence of any fact which, *if established*, would constitute a breach of an international obligation',¹ he agreed that:

At the preliminary stage it would seem therefore sufficient to determine whether the parties are in conflict as to their respective rights. It would not appear necessary to enter at that stage into questions which really pertain to the merits and constitute the heart of the eventual substantive decision such as for instance the establishment of the rights of the parties or the extent of the damage resulting from radio-active fall-out.

Although, in the introduction to his declaration,² Judge Nagendra Singh appears to concur with Judge Jiménez de Aréchaga in emphasizing that, before taking action under Article 41 of the Statute, 'the Court must be satisfied of its own competence, even though *prima facie*', it would seem from the remainder of his declaration³ that he supported the more liberal test promulgated by the majority in the *Fisheries Jurisdiction* cases, and by Judge Lauterpacht in *Interhandel*.⁴ Judge *ad hoc* Sir Garfield Barwick voted for interim measures

. . . because the very thorough discussions in which the Court has engaged over the past weeks and my own researches have convinced me that the General Act of 1928 and the French Government's declaration to [*sic*] the compulsory jurisdiction of the Court with reservations each provide, *prima facie*, a basis on which the Court might have jurisdiction to entertain and decide the claims made by [the Applicants]. Further, the exchange of diplomatic notes between the Governments of [the Applicants] and France in 1973 afford, in my opinion, at least *prima facie* evidence of the existence of a dispute between those Governments as to matters of international law affecting their respective rights.⁵

Particularly if one emphasizes the word 'might' in the first sentence, the inference would seem to be that Sir Garfield supported the liberal test espoused by the majority.

Of the six Judges constituting the minority, four appended dissenting opinions.⁶ It is worth noting that all four had subscribed to the majority decision in the *Fisheries* (jurisdiction) cases. For Judge Forster, before exercising the power conferred by Article 41

¹ Statute, Art. 36 (2) (c).

³ *Ibid.*, at pp. 108-10.

⁵ *I.C.J. Reports*, 1973, p. 99 at p. 110.

⁶ The report does not reveal the identity of the other two.

² *I.C.J. Reports*, 1973, p. 99 at p. 108

⁴ Above, pp. 280-2, 276-8.

. . . the Court must have jurisdiction. Even when it considers that circumstances require the indication of provisional measures, the Court, before proceeding to indicate them, must satisfy itself that it has jurisdiction. Neither the provisional character of the measures nor the urgency of the requirement that they be indicated can dispense the judge from the necessity of ascertaining his jurisdiction *in limine litis*; especially when it is seriously and categorically contested by the State proceeded against, which is the case at present.

In my view the Court does not have two distinct kinds of jurisdiction: one to be exercised in respect of provisional measures and another to deal with the merits of the case. The truth of the matter is that there are some cases in which our jurisdiction is so very probable as rapidly to decide us to indicate the provisional measures, whereas in other cases, like the present one, it is only after a thorough examination that our jurisdiction, or lack of jurisdiction, can become apparent.¹

After indicating his doubts as to the survival of the General Act and its ability to prevail over an Optional Clause reservation which he regarded as plainly excluding the Court's competence, the learned Judge continued:

The Order made this day is an incursion into a French sector of activity placed strictly out of bounds by the third reservation of 16 May 1966. To cross the line into that sector, the Court required no mere probability but the absolute certainty of possessing jurisdiction. As I personally have been unable to attain that degree of certainty, I have declined to accompany the majority.²

If his words are interpreted literally, Judge Forster appears to have espoused a very strict test indeed. Even the 'reasonable probability' of jurisdiction which would have satisfied Judges Winiarski and Badawi Pasha in the *Anglo-Iranian* case³ does not seem to suffice; the Court must be 'absolutely certain' of its competence, which presumably confines interim measures to Cases 1 and, at best also 2, in our list.⁴

Judge Gros considered that the Court had wrongly interpreted Articles 41 and 53⁵ of the Statute.⁶ If it thought that France's action amounted to non-appearance within the meaning of Article 53, it should forthwith have proceeded to determine whether it had jurisdiction over the merits and whether the claim was well founded in fact and law. In his view, it was not correct to suspend the application of this Article provisionally in the present case on the ground that this was an interim measures phase. To do so

¹ *I.C.J. Reports*, 1973, p. 99 at p. 111.

² *Ibid.*, at p. 112.

³ Above, pp. 272-4.

⁴ Judge Forster also held that the circumstances did not warrant the indication of interim measures.

⁵ Article 53 provides:

1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

⁶ *I.C.J. Reports*, 1973, p. 99 at pp. 115-23.

would be to ignore the intimate connection which exists between the request for interim measures and the original Application. In a passage which merits quotation in full,¹ he went on:

A request for interim measures of protection is thus a particular phase, but one which is not independent of the original Application: there is no magic in words, and it is impossible to believe that problems of jurisdiction, admissibility and reality of the principal Application can be conjured away simply by stating that these points, which are essential for a court of specific jurisdiction like this Court, are just being taken for granted provisionally, *prima facie*, without their being prejudged. It is in each individual case by reference to the jurisdictional problems in the widest sense, to the circumstances, and to the '*respective rights of either party*' (Art. 41, emphasis added) that a decision should be taken as to whether it is possible to indicate interim measures, and the forms of words used must correspond to reality.

Such was not the analysis of the power instituted in Article 41 of the Statute which was carried out in the present instance. The Court, by putting off the decision on the effects of non-appearance, embraced the proposition that a request for provisional measures is utterly independent in relation to the case which is the subject of the Application.

It is no use referring to certain domestic systems of law which feature such independence, because the Court has its own rules of procedure and must apply them in its jurisdictional system, which, as a corollary of a certain kind of international society, has been established on the basis of the voluntary acceptance of jurisdiction. It is a fact of international life that recourse to adjudication is not compulsory; the Court has to take care lest, by the indirect method of requests for provisional measures, such compulsion be introduced *vis-à-vis* States whose patent and proclaimed conviction is that they have not accepted any bond with the Court, whether in a general way or with regard to a specified subject-matter.

If it were a question of a State, whose non-appearance was due to the total absence of the Court's jurisdiction, whether for want of a valid jurisdictional clause or by reason of the inadmissible character of the principal claim, the immediate decision of lack of jurisdiction in regard to the Application instituting proceedings itself would be taken without delay; the decision of the Court in the present case is that, despite the affirmation that a certain subject-matter has been formally excluded from the jurisdiction of the Court, and the fact that the State which made that affirmation considers itself to be outside the jurisdiction of the Court in regard to everything connected with that subject-matter, it is possible to indicate provisional measures without prejudging the rights of that State.

In the decision which the Court has to take on any request for provisional measures, urgency is not a dominant and exclusive consideration; one has to seek, between the two notions of jurisdiction and urgency, a balance which varies with the facts of each case. If the jurisdiction is evident and the urgency also, then there is no difficulty, but that is an exceptional hypothesis. When the jurisdiction is not evident, whether there is urgency or not, the Court must take the time needed for such an examination of the problems arising as will enable it to decide one way or the other, and that is something which it could have done without undue delay in the present instance with regard to various objections to its power to judge the case as described in the principal Application.

¹ *I.C.J. Reports*, 1973, p. 99 at pp. 119-21.

There is no presumption of the Court's jurisdiction in favour of the applicant, nor any presumption of its lack of jurisdiction in favour of the respondent; there is only the right of each of them to a proper and serious examination of its position.

A State does not have to wait two years or more for the Court to vindicate its claim that no justiciable dispute exists, for if that is the case there is nothing to be argued over; the other State, which has submitted the claim whose reality is contested, evidently has an equal right to have the Court acknowledge the existence of the dispute it invokes. But the equality between these claims is upset if, by the indirect means of the allegedly urgent necessity for the indication of provisional measures, a presumption operates in favour of the applicant without the Court's carrying out any serious appraisal of the objection. On behalf of the Applicant it has been pleaded that argument on all these problems will be presented later; that in itself is a negation of the claim of the other State to be immediately relieved of a dispute which it alleges not to exist. Thus, to maintain equality between the parties, in a case where objections relating to the very stuff of the dispute are raised, the priority treatment of these objections is a necessity.

If, on the other hand, Article 53 was not applicable, the learned Judge, relying on certain dicta, and notably that of Judge Sir Gerald Fitzmaurice in the *Northern Cameroons* case,¹ held that absolute priority should have been given to the question of admissibility or receivability. Then, turning to the question whether the circumstances required the indication of interim measures, within the meaning of Article 41 of the Statute, he went on:²

But if the State cited as respondent invokes the Court's total absence of power, and if the subject of the claim is really non-existent, what rights would there be to preserve?

What has been said above with regard to the character of absolute priority attaching to certain objections shows that it is impossible to escape from the necessity of settling such objections before indicating measures of protection; if there are no rights, there is nothing to protect. If the claim has no subject, the principal application falls to the ground, and with it the request for provisional measures. The objection is of so fundamental a nature in regard to the very bases of the Court's jurisdiction that it seems to me to be a misuse of language to say that a *jus standi* to act in such circumstances could exist *prima facie*.

When the Court declares on the basis of Article 41 that a decision indicating provisional measures prejudices neither the jurisdiction nor the merits, that is not a finding which is likely to reassure States as to the temporary and circumstantial nature of that decision; it is an assertion that the examination of the case by the Court in accordance with the criteria of Article 41 of the Statute enables it, in the circumstances of this case, to consider that its decision cannot in fact prejudice either its jurisdiction or the question of *jus standi*. It is not just a kind of ritual formula, but a warranty that the Court is satisfied that Article 41 has been correctly interpreted and applied to a certain case. But if in reality an indication of provisional measures prejudices the jurisdiction or the existence of *jus standi*, the Court does not have the power to grant these measures, because the condition laid down by Article 41 of the Statute will not have been respected. These conditions not having been fulfilled in the present case, the application of Article 41 in the Order of 22 June 1973 indicating provisional measures constitutes an action *ultra vires*.

¹ *I.C.J. Reports*, 1963, p. 15 at pp. 105-7.

² *Ibid.*, 1973, p. 99 at pp. 122-3.

These views appear to be more restrictive of the Court's power to indicate interim measures than any expressed in previous cases. In the first place, if it is correct that, when the respondent fails to appear, the Court must immediately proceed to an examination of its jurisdiction and of the merits, interim measures would seem to be completely excluded at any stage in the proceedings. In such circumstances, even Case 1 in our list would not qualify for the indication of interim measures, for, after deciding that it had jurisdiction, the Court would have to proceed immediately to a determination of the merits. Nor would it necessarily make a difference that the applicant had not requested judgment by default, for Judge Gros expressed the opinion that the Court had the power and duty to take note of non-appearance *proprio motu*.¹ In the second place, even if Article 53 were not applicable, questions of admissibility and jurisdiction would take absolute precedence and would have to be settled, apparently definitively, before granting a request for provisional measures (save where, exceptionally, jurisdiction and admissibility were 'evident'). If this correctly represents the learned Judge's opinion, it is even more conservative than that of Judges Winiarski and Badawi in the *Anglo-Iranian* case, for they would have been prepared to indicate interim measures before the final determination of the Court's jurisdiction if a positive finding was 'reasonably probable'.²

Judge Gros sought to distinguish the Orders of the Court in the *Fisheries Jurisdiction* cases. He said:³

A certain tendency has arisen to consider that the Orders of 17 August 1972 in the *Fisheries Jurisdiction* cases have, as it were, consolidated the law concerning provisional measures. But each case must be examined according to its own merits and, as Article 41 says, according to 'the circumstances'. Now the case of Iceland was entirely different in circumstances. The Court had developed an awareness of the existence of its own jurisdiction, the urgency was admitted, the reality and the precise definition of the dispute was not contested; finally, the right of the Applicant States which was protected by the Orders was recognized as being a right currently exercised, whereas the claim of Iceland constituted a modification of existing law. It suffices to enumerate these points to show that the situation is entirely different today; so far as the last point is concerned, the situation is now even the reverse, since the Applicants stand upon a claim to the modification of existing positive law when they ask the Court to recognize the existence of a rule forbidding the overstepping of a threshold of atomic pollution.

That the two pairs of cases are capable of being distinguished on their facts cannot be doubted. Nevertheless, the views expressed by Judge Gros in the *Nuclear Tests* cases seem hard to reconcile with the liberal test to which

¹ *I.C.J. Reports*, 1973, p. 99, at p. 118. He also held, alternatively, that the Applicants in the instant case had in fact impliedly invoked Article 53—a contention which, it is respectfully submitted, is not borne out by the pleadings.

² See above, pp. 272-4.

³ *I.C.J. Reports*, 1973, p. 99 at p. 122.

he subscribed in the *Fisheries Jurisdiction* cases,¹ particularly when it is borne in mind that, like France, Iceland too had refused to appear or to appoint an Agent.²

Judge Petré'n's views were less extreme.³ Observing that, before embarking on an examination of the merits, the Court was obliged to satisfy itself as to its jurisdiction and the admissibility of the claim, he considered that the fact that a request had been made for the indication of interim measures did not dispense the Court from the obligation of beginning with an examination of these issues; 'indeed, it makes that examination, if anything, more urgent'. The statement by the Court in the *Fisheries Jurisdiction* cases that it need not, before indicating provisional measures, finally satisfy itself that it had jurisdiction on the merits, but ought not to act under Article 41 if the absence of jurisdiction was manifest, simply defined the attitude of the Court towards two extreme situations, and said nothing of how the line was to be drawn in cases falling between these limits. The answer to this question was to be found in a later paragraph, where the Court said that it considered that a provision in an instrument emanating from the parties appeared, *prima facie*, to afford a possible basis on which the jurisdiction of the Court might be founded. The same view had been expressed by the Court in paragraph 13 of the present Order.

So far, the present writer would respectfully agree with this interpretation of the dicta of the Court.⁴ However, the learned Judge went on to say that in his view 'this formula . . . signifies that for Article 41 of the Statute to be applicable it is not sufficient for a mere adumbration of proof, considered in isolation, to indicate the possibility of the Court's possessing jurisdiction: that there must also be a *probability* transpiring from an examination of the whole of the elements at the Court's disposal'.⁵ It has been submitted that this interpretation of the Court's words is probably incorrect⁶. But be that as it may, Judge Petré'n went on to apply his test to the titles of jurisdiction relied on by the Applicants. He found them wanting, though, not wishing to prejudice the next phase of the case, which the Court had decided would concern jurisdiction, he did not elaborate on his reasons.

Judge Petré'n also dissented from the majority in considering that the question of the admissibility of the Application should have been dealt with by the Court at the current session, and that, unless a favourable decision on admissibility was probable, interim measures could not be indicated.

¹ See above, pp. 280-2.

² Judge Gros, like Judge Forster, also dissented on the questionable ground that the request sought an interim judgment rather than interim protection, and so was beyond the power of the Court to grant: *I.C.J. Reports*, 1973, p. 99, at pp. 123 and 113, respectively.

³ *Ibid.*, at pp. 124-7.

⁴ See above pp. 280-2, 286-7.

⁵ *I.C.J. Reports*, 1973, p. 99, at p. 126.

⁶ Above, pp. 280-2, 286-7.

However, as he did not wish to prejudge such vote as he might cast in the new phase of the proceedings, and had already found Article 41 inapplicable because of his doubts as to the Court's jurisdiction, he did not consider it appropriate to say anything further on this point.¹

Judge Ignacio-Pinto voted against the indication of interim measures of protection on the ground that the titles relied upon by the Applicants were insufficient to found the jurisdiction of the Court, particularly in the face of the French reservation to her Optional Clause declaration; moreover, the rights claimed by the Applicants had no legal existence.² He did not qualify these findings by saying that they were provisional, pending final decision at the appropriate time. In this, his observations differ from every single judicial pronouncement, collective or individual, which has ever been made on the subject of interim measures, apart from the declaration of Judge Wellington Koo in the *Interhandel* case.³ Moreover, since he proceeded to an immediate determination of the question of the jurisdiction of the Court and of the admissibility of the claim, it is impossible to deduce from his opinion what degree of probability of jurisdiction would normally satisfy him before he would be prepared to indicate interim measures. Even his reference to the *Fisheries Jurisdiction* cases offers no enlightenment, for in distinguishing them, he simply observed that in those cases 'there is no possible doubt as to the consent of the parties', without alluding to the fact that, when the Orders were made, there had not yet been a definitive finding on the question of jurisdiction.⁴ With respect, this all-or-nothing, once-and-for-all approach to dealing with jurisdictional issues at the interim measures stage seems to ignore the nuances of the problem, as well as being inconsistent with the views to which Judge Ignacio-Pinto himself subscribed in the *Fisheries Jurisdiction* cases.

After the near-unanimous decision in the *Fisheries Jurisdiction* cases, it might have been thought that the liberal 'Lauterpacht' test was firmly embedded in the jurisprudence of the Court. Within ten months, however, it had been seriously challenged, even though the composition of the Court had not radically changed in the meantime.⁵ Although there was a majority in favour of indicating interim measures in the *Nuclear Tests* cases, only seven of the fourteen members of the Court were prepared to state their

¹ *I.C.J. Reports*, 1973, p. 99, at p. 127.

² *Ibid.*, at pp. 128-33.

³ Above, p. 276. Even Judge Gros, who, as we have seen, took a very conservative view of the Court's powers under Article 41, was very careful not to express definitive views on matters which the Court had decided would be for subsequent determination.

⁴ *I.C.J. Reports*, 1973, p. 99, at p. 129.

⁵ Judges Sir Humphrey Waldock, Nagendra Singh and Ruda, and Judge *ad hoc* Sir Garfield Barwick had replaced President Sir Muhammed Zafrulla Khan and Judges Sir Gerald Fitzmaurice and Padilla Nervo; and President Lachs and Judge Dillard were not present when the Orders in the *Nuclear Tests* cases were made.

readiness to apply the same criteria once more.¹ Judges Petré and Jiménez de Aréchaga were prepared to indicate interim measures only if there was, on balance, a probability of jurisdiction, though the application of this test to the facts led them to opposite conclusions. Judges Forster and Gros would, in effect, have wished the Court to decide the issues of jurisdiction and admissibility at once, while Judge Ignacio-Pinto actually did so. The opinions of the other two, unidentified, dissentients are not known; they may have disagreed with the majority on the nature of the test to be applied, or simply on their evaluation of the probability of establishing the Court's competence from the material before them.

Less than a month later, an almost identically composed Court² gave its decision on yet another request for interim measures, this time from Pakistan, in the *Trial of Pakistani Prisoners of War, Interim Protection* case.³ On 11 May 1973 Pakistan had instituted proceedings against India asking the Court to declare that, by virtue of Article VI of the Genocide Convention,⁴ Pakistan had the exclusive right to exercise jurisdiction over the Pakistani nationals, then in Indian territory, and accused of committing acts of genocide in Pakistani territory; that the allegations against the aforesaid prisoners of war were related to acts of genocide; that there could be no ground in international law justifying the transfer of custody of the prisoners of war to Bangladesh for trial in face of Pakistan's exclusive right to exercise jurisdiction over its nationals accused of committing offences in Pakistani territory; that India would act illegally in transferring such persons to Bangladesh for trial; and that, even if India could legally transfer Pakistani prisoners of war to Bangladesh for trial, she would be divested of that freedom since, in the atmosphere which, according to the Government of Pakistan, prevailed in Bangladesh, a 'competent tribunal' within the meaning of Article VI of the Convention could not be created in practice nor be expected to perform in accordance with accepted international standards of justice.⁵ On the same day, the Applicant filed a request under Article 41 of the Statute, requesting the Court to indicate, as an interim measure of protection:

(1) That the process of repatriation of prisoners of war and civilian internees in accordance with international law, which has already begun, should not be interrupted by virtue of charges of genocide against a certain number of individuals retained in India.

¹ i.e. the five Judges who were responsible for the majority opinion plus the two Judges whose individual declarations seem to adopt the same approach, viz., Judge Nagendra Singh and Judge *ad hoc* Barwick.

² This time, Judge Lachs was present, but Vice-President Ammoun, Judge de Castro and (of course) Judge *ad hoc* Sir Garfield Barwick were not.

³ *I.C.J. Reports*, 1973, p. 328.

⁴ 'Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction'; *U.N. Treaty Series*, vol. 78, p. 277.

⁵ Verbatim Record of the Public Sitting held on 4 June 1973, I.C.J. Doc. C.R. 73/9, p. 6.

(2) That such individuals, as are in the custody of India and are charged with alleged acts of genocide, should not be transferred to 'Bangladesh' for trial till such time as Pakistan's claim to exclusive jurisdiction and the lack of any other Government or authority in this respect has been adjudged by the Court.

In the event, a Pakistani application for a postponement of her request in order to facilitate negotiations which she expected to have with India was taken by the Court as indicating that the urgency which was an essential element in the Article 41 procedure was no longer present, and that it was therefore not called upon to pronounce on the request.¹ Nevertheless, the case raised important questions regarding the competence of the Court to indicate interim measures before deciding on its jurisdiction to deal with the merits—questions to which a substantial part of the oral argument was devoted, and which it will be instructive to examine here.

Pakistan founded the jurisdiction of the Court on three titles: first, and principally, on Article IX of the Genocide Convention;² secondly, on Article 17 of the General Act of 1928;³ and, finally, on the Declarations of Acceptance of the Optional Clause by both parties. India refused to appear or to appoint an Agent, and although she set out her grounds for contending that the Court lacked competence in a series of letters, these have not yet been made public by the Court; accordingly, it is only possible to gather what her objections were via the attempts of Pakistan's representatives to counter them.

India's objection to founding the jurisdiction of the Court on Article IX of the Genocide Convention was based on the fact that, in ratifying that treaty, she had entered a reservation which read as follows: 'With reference to Article IX of the Convention the Government of India declare that, for the submission of any dispute in terms of this Article to the jurisdiction of the International Court of Justice, the consent of all the parties to the dispute is required in each case.'⁴ India refused her consent and so, she said, the Court was without jurisdiction on this count. Pakistan's answer to this was to assert that the Indian reservation was invalid, being incompatible with the object and purpose of the treaty; and it did not necessarily follow that if this was correct, India had not become a party to the Convention. The fact that she (Pakistan) had not previously objected to the reservation was also irrelevant.⁵

¹ *I.C.J. Reports*, 1973, p. 328, at p. 329. The case was subsequently removed from the Court's list at Pakistan's request. *I.C.J. Communiqué* No. 73/35, 15 December 1973.

² 'Disputes between the Contracting Parties relating to the interpretation and application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.'

³ Above, p. 283 n. 2.

⁴ *I.C.J. Doc. C.R. 73/9*, p. 51.

⁵ Verbatim Record of the Public Sitting held on 26 June 1973, *I.C.J. Doc. C.R. 73/11*, pp. 6-15 and 34-9.

So far as the General Act was concerned, there were two main obstacles to the Court's jurisdiction even if, contrary to India's contention, the Act was still in force. First, although British India had become a party on 21 May 1931, Pakistan had not acceded to that instrument or to the Revised General Act of 28 April 1949.¹ To this, Pakistan's Counsel, Mr. Bakhtiar, responded that Pakistan had become a party automatically, as from the date of her independence, by virtue of the provisions of an agreement contained in the (British) Indian Independence (International Arrangements) Order, 1947, and the law of state succession; the fact that no notification of succession of accession to the General Act or the Revised General Act had been given to the depositary or the parties was in his view immaterial, as such communication was unnecessary, at least as between Pakistan and India.² The second obstacle was that India had made reservations in respect of her acceptance of the compulsory jurisdiction of the Court under Article 17 of the General Act, excluding the following:

Disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement.

Disputes between the Government of India and the Government of any other member of the League which is a member of the Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree.

Disputes with any party to the General Act who is not a member of the League of Nations.

Pakistan tried to counter this by saying that the reservations were not within the category of reservations permitted under the General Act, and alternatively that the first reservation was inapplicable because the method of settlement agreed to under the Genocide Convention was not 'some other method of peaceful settlement'; that Pakistan was no longer a member of the Commonwealth; and that the last reservation had become 'infructuous or objectless' with the demise of the League, and, in any case, both India and Pakistan were successors to British India, which had been a member of the League. Moreover, disputes about the interpretation or application of the General Act had to be referred to the Court, by virtue of the provisions of Article 41 thereof. Pakistan, therefore, claimed that a finding in favour of the Court's jurisdiction over the present dispute on the basis of the General Act was 'probable'.³

So far as the Optional Clause was concerned, both sides had appended reservations to their declarations which appeared to cover the dispute. Reservation 1 to India's declaration was similar to her first reservation to the General Act, and Pakistan's response was also similar; recourse to the

¹ *U.N. Treaty Series*, vol. 71, p. 102.

² I.C.J. Doc. C.R. 73/11, pp. 15-33.

³ *Ibid.*, pp. 55-8.

Court on the basis of another instrument was not 'another method of settlement'.¹ Reservations 2 and 6 excluded:

(2) disputes with the Government of any State which, on the date of this declaration, is a Member of the Commonwealth of Nations;

(6) disputes with the Government of any State, with which, on the date of an application to bring a dispute before the Court, the Government of India has no diplomatic relations.

Pakistan contended that these two reservations were invalid, since Article 36 (3) of the Statute, which laid down the limits within which reservations might be made, allowed Optional Clause declarations to be made conditional only on reciprocity on the part of several or certain States, and/or for a certain time. With regard to reservation 2, Pakistan further submitted that 'it had as its rationale the availability of a procedure of consultations within the Commonwealth which, in the present context, no longer exists'. Reservation 6, her Counsel contended, 'if it can be made at all, must surely mean and cover those situations where till that date there have been no diplomatic relations at all, and not the case of Pakistan and India, which have always had diplomatic relations, such relations having only been temporarily suspended due to hostilities'. India, invoking the principle of reciprocity, also relied on Pakistan's own reservation to its Optional Clause declaration excluding '. . . disputes arising under a multilateral treaty unless: (i) All parties to the treaty affected by the decision are also parties to the case before the Court, or (ii) the Government of Pakistan specially agree to jurisdiction.' Pakistan attempted to counter the point by saying that the only parties to the Genocide Convention affected by a decision would be herself and India. It seems that the Respondent also claimed that Pakistan's case was really against Bangladesh, not herself, and further that the Court had no competence unless Bangladesh was made a party to the proceedings, and consented to the jurisdiction of the Court.² Pakistan did not reply to these points in any detail.

Despite the Applicant's assertion that she had an answer to all the Indian objections, even Pakistan could hardly describe this as a case where the jurisdiction of the Court was beyond dispute, and did not attempt to do so. Instead, Mr. Bakhtiar argued that the Court's power to grant interim measures of protection had an independent consensual basis in the Statute itself, to which all parties had given their consent; accordingly, so long as there were rights to be preserved, the Court could indicate interim measures without regard to the existence of jurisdiction over the merits.³ With reference to the statement in paragraph 15 of the Order in the *Fisheries Jurisdiction* case that 'the Court . . . ought not to act under Article 41 of

¹ I.C.J. Doc. C.R. 73/11, pp. 41-5.

² Ibid., pp. 63-4.

³ I.C.J. Doc. C.R. 73/9, pp. 45-50.

the Statute if the absence of jurisdiction on the merits is manifest', he submitted that:

... the absence of jurisdiction on the merits is manifest within the meaning of that expression ... only when the petitioner is unable to cite a basis for the jurisdiction of the Court and invites the other party to submit to the jurisdiction of the Court and that party is not willing to do so, as was the position in the *Aerial Incident* cases. If, on the other hand, one of the parties asserts that the Court has jurisdiction, and cites a *prima facie* basis for it, while the other party disputes this, then clearly there is a controversy about jurisdiction and the Court would not then hold that the absence of jurisdiction is manifest without making a final decision with respect to its jurisdiction. But this would be a decision which, in accordance with the Statute and Rules of Court, cannot be made at this stage without taking into consideration written and oral pleadings. It would seriously prejudice the applicant's position if he were denied interim relief on ground that the Court, by a purely summary view, had come to the conclusion that it would probably hold later on that it was not entitled to exercise jurisdiction.¹

He went on to define 'manifest' as 'so apparent that no sane man will deny it'.²

The test which the applicant asked the Court to apply is an extremely liberal one. It would go beyond what Judge Lauterpacht was prepared to accept in *Interhandel*, both as a general proposition and in its application to the facts of the particular case, as he saw them, for it would permit and, as it was put, require the Court to indicate interim measures whenever a title of jurisdiction was adduced, and even if the respondent was relying on reservations which plainly seemed to render the Court incompetent. Indeed, it would even allow the Court to indicate interim measures at the request of an applicant who did not rely on any title of jurisdiction, but was simply hoping for a *forum prorogatum*, so long, at any rate, as the respondent did not clearly indicate its refusal to confer jurisdiction on the Court in this manner.

Given the serious divergence of views which the *Nuclear Tests* cases had just laid bare,³ and the multiplicity of jurisdictional issues which had been raised by the parties, it is perhaps not too fanciful to conjecture that the Court must have received the Pakistani request for a postponement, and the opportunity it presented of dismissing the request without deciding these issues, with a certain feeling of relief. It is, in any event, noteworthy that in this case the Court simply found that it was 'not ... called upon to pronounce upon the said request', without going into the question of its jurisdiction,⁴ whereas in *Interhandel*—where, similarly, new developments

¹ Ibid., p. 48.

² Ibid., p. 49.

³ See above, pp. 286-97.

⁴ *I.C.J. Reports*, 1973, p. 328, at p. 330. The Court did, it is true, state in the last paragraph of the recitals: 'Whereas in the circumstances of the present case the Court must first of all satisfy itself that it has jurisdiction to entertain the dispute', but this was preparatory to deciding that written proceedings should first be addressed to the question of jurisdiction; it says nothing, or nothing explicit, about the views of the Court as to the degree of probability of jurisdiction which existed or was required at the interim measures stage.

had removed the urgency from the situation—the Court did determine that it had the power to examine the request before going on to decide that circumstances did not warrant granting it.

Judge Nagendra Singh, while concurring in the result, thought that considerations of judicial propriety should have led the Court to refuse to deal with the case any further.¹ In his opinion, the Court could not adjudicate on the rights and duties of Bangladesh without giving it a hearing and obtaining its clear consent. 'Furthermore', he added, 'it appears to me that the Court has not been in proper seisin of the case from the very beginning and lacks all *prima facie* competence'; he did not, however, elaborate.

Four Judges dissented from the Order of the Court, but only Judge Petrén gave his reasons. He dissented from the Order essentially on the ground that Pakistan's application for a postponement of its request for interim measures was not a withdrawal of the request and should not have been treated as such by the Court.² He did not, on this occasion, discuss in any detail how probable jurisdiction on the merits should be before interim measures were indicated, though he did express the view that:

The fact that the Government of Pakistan has requested the indication of provisional measures does nothing to dispense the Court from the duty of settling the question of its jurisdiction even in the initial stage of the proceedings, if that should prove to be possible. In the absence of the Government of India, it is, in accordance with Article 53 of the Statute, incumbent upon the Court also to take into consideration such elements as militate in favour of the position adopted by that Government.³

The arguments for and against jurisdiction had been presented by both sides, and did not appear to be enmeshed with the merits; the Court could accordingly have decided the question even at the present early stage. Since the Court had not followed this course, he did not indicate how he would have decided the question, but from the relative strictness of the test which he had espoused in the *Nuclear Tests* cases,⁴ and from his readiness to make a decision even without India's being given another opportunity to elaborate on its objections, it may perhaps be inferred that he would have held that the Court was without jurisdiction to proceed to the merits.

THE LITERATURE

In the already sparse literature on the indication of interim measures of protection by the World Court, very little has been written on the power of the Court to make such an indication in advance of a determination of its jurisdiction; and even those writers who have addressed themselves to the subject have, for the most part, contented themselves with observing

¹ *I.C.J. Reports*, 1973, p. 328, at pp. 332–3.

² *Ibid.*, pp. 334–6.

³ *Ibid.*, p. 334.

⁴ Above, pp. 295–6.

that the Court need not satisfy itself of its competence before indicating such measures, without considering what degree of probability suffices. To catalogue these writers would be pointless, and it will be sufficient to summarize the views of those who have looked into the matter a little more deeply.¹

Commenting on the *Anglo-Iranian* case, Hudson observed that he had himself consistently maintained the view that the Court is not required to conduct a preliminary inquiry into its jurisdiction before indicating interim measures.

The contrary view expressed by Judges Winiarski and Badawi Pasha would seriously limit the value of Article 41 of the Statute, and it would cripple the Court in its exercise of a function which is essential to effective adjudication. Yet a case might arise in which the Court's lack of jurisdiction is patent—as it might have been in this case if Iran had made no declaration under Article 36 (2) of the Statute; in such a case the Court would naturally take this into account in connection with the condition set in Article 41 by the phrase 'if it considers that circumstances so require'.²

Evidently, he would not have favoured the indication of interim measures where no title of jurisdiction had even been raised, but whether he would have taken the same position where such a title had been raised, but the objections to it seemed *prima facie* certain, or very likely, to succeed, is less clear. In view of the last sentence of the passage quoted above, it seems that he might have made the answer depend on the other circumstances.³

Commenting on the same case, Barile, on the other hand, aligned himself with the minority Judges on the ground that since the object of interim measures is to ensure the application of the final judgment, there must be a reasonable prospect that such a judgment will ultimately be given. The urgency of the procedure means that the *cognitio* must necessarily be *summaria*, but it should not be superficial.⁴ In Rosenne's view:

Ratione temporis a request for an indication of interim measures may be made at any time during the proceedings in the case in connexion with which it is made. The period of time coming within the expression 'during the proceedings in the case in connexion with which it is made' means the period of time commencing on the day upon which the document instituting proceedings is filed, and terminating not later than the day on which the proceedings are terminated. Neither before, nor after, that space of time is 'during the proceedings in the case in connexion with which' the request is made. However, if it is clear on the face of the document instituting proceedings that the jurisdiction of the Court to hear the case on its merits requires some

¹ The views of Dumbauld, Niemeyer and Lauterpacht have already been referred to (above, pp. 269, 270, 278).

² 'The Thirtieth Year of the World Court', *American Journal of International Law* 46 (1952), p. 1, at p. 22. See also his *The Permanent Court of International Justice 1920-1942* (1943), p. 426.

³ Cf. below, pp. 310-20.

⁴ 'Osservazioni sulla indicazione di misure cautelari nei procedimenti davanti la Corte Internazionale di Giustizia', *Comunicazioni e studi*, 4 (1952), p. 145, at pp. 146-7.

step on the part of the respondent state for its perfection, then, in accordance with what has previously been established, there will be no 'proceedings', and consequently no inherent jurisdiction to indicate provisional measures, until that step has been taken. The position might be otherwise so long as it is not clear whether the respondent has refused the invitation to accept the jurisdiction of the Court . . . , and no difficulty is seen if the applicant has indicated *prima facie* that the Court has jurisdiction, even if the jurisdiction invoked is contested.¹

In stating that there are no 'proceedings' in relation to which interim measures may be indicated when the jurisdiction of the Court needs to be perfected by steps on the part of the respondent, what the learned author would seem to have in mind is the fact that, if the applicant relies on no title of jurisdiction but simply hopes for the express or tacit consent of the respondent, and this is not forthcoming, the Court is not validly seized of the dispute.² He goes on, however, to qualify his statement by suggesting that it might be otherwise if the respondent has not yet actually refused to confer jurisdiction on the Court, a situation which would come within Case 10 in our list. With respect, Fitzmaurice is surely right when he says that this 'may go somewhat too far, for it would not only enable the Court to indicate interim measures in a case in which it was clear that, *at that moment*, it had no jurisdiction, but to do so on the strength of a purely hypothetical possibility that it might thereafter acquire it on the basis of *forum prorogatum*'.³ But in any event, the chances of the Court's having to deal with a request for interim measures without knowing the reaction of the respondent to the invitation are remote, for it would be a foolhardy respondent who risked the imposition of interim measures when a simple letter to the Court refusing the invitation could dispel the danger.

It should also be noted that Rosenne's final observation in the passage quoted does not lay down an exhaustive test, but simply the limit of general agreement. His subsequent brief examination of the cases up to and including *Interhandel* does not really add anything, although, if he surmises that the Court might indicate interim measures even in Case 10 in our list, it would naturally follow that he thinks that it could also do so in the less extreme instances. When dealing with *lex ferenda*, he makes his position

¹ Op. cit. (above, p. 262 n. 2), vol. 1, p. 424.

² Ibid., p. 313; cf. Shihata, op. cit. (above, p. 275 n. 4), pp. 85-7; Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour Internationale* (1967), pp. 49-54; Grisel, *Les exceptions d'incompétence et d'irrecevabilité dans la procédure de la Cour Internationale de Justice* (1968), pp. 67-9.

³ 'The Law and Practice of the International Court of Justice: 1951-4', this *Year Book* 34 (1959), p. 1, at p. 114. It is true that in the *Anglo-Iranian Oil Co.* case (to which Rosenne refers in making his suggestion), such an invitation had been proffered by the United Kingdom, but, as he himself admits (op. cit. (above, p. 262 n. 2), pp. 354-5), this was put forward only in the alternative to reliance on the Iranian declaration under the Optional Clause; and, in any case, Iran had already made it fairly clear that she was not willing to confer jurisdiction on the Court by *forum prorogatum*. Accordingly, the decision to indicate interim measures cannot be cited as authority for his proposition.

clearer. While acknowledging that, on the existing constituent documents and practice of the Court, there is no essential connection between the power of the Court to indicate provisional measures and its jurisdiction to deal with the merits, he goes on to express scepticism as to how far the Security Council may, or is likely to, ensure compliance with such measures, and continues:

If that is so, then the effectiveness of any interim measures indicated by the Court will depend upon the extent of the real consent by the parties that the Court should adjudicate. Having regard to the exceptional power which this jurisdiction involves, it may be arguable that it ought to be more closely integrated with the principal jurisdiction to deal with the case on the merits than it now is.¹

Fitzmaurice begins by observing that:

The jurisdiction to indicate interim measures of protection is, so far as the International Court is concerned, part of the incidental jurisdiction of the Court, the characteristic of which is that it does not depend on any direct consent given by the parties to its exercise, but is an inherent part of the standing powers of the Court under its Statute. Its exercise is therefore governed, not by the consent of the parties (except in a remote sense) but by the relevant provisions of the Statute and of the Rules of Court.²

(The reference to 'consent in a remote sense' is to the fact that the parties have agreed to the Statute, and, via Article 30 thereof, to the relevant provisions of the Rules of Court.) But, he goes on, although the jurisdiction under Article 41 of the Statute is incidental, it is not necessarily incidental to 'substantive jurisdiction' (i.e. jurisdiction to determine the merits) already possessed by the Court in respect of the dispute as such, in the sense that it cannot be exercised unless the Court does possess substantive jurisdiction. Like the jurisdiction to determine its own jurisdiction under Article 36 (6) of the Statute, the Court's power under Article 41 is independent of its substantive jurisdiction, at least initially.³ It thus arises as a 'pre-preliminary issue', that is, as a preliminary and not a substantive issue of jurisdiction.⁴ The ability of the Court to indicate interim measures in advance of a decision on its substantive jurisdiction is essential if the purpose for which the latter may eventually be exercised is not to be frustrated or prejudiced.

This independence is, however, subject to two qualifications. First, the power to indicate interim measures cannot survive a determination that the Court is without substantive jurisdiction. Secondly, if it is apparent *a priori* that the Court *could not* possess substantive jurisdiction, particularly on

¹ Op. cit. (above, p. 262 n. 2), p. 428.

² Op. cit. (above, p. 304 n. 3), pp. 107-15.

³ Initially, because interim measures will be raised from the moment the Court finds it has no jurisdiction to determine the merits, as happened in the *Anglo-Iranian Oil Co.* case, *I.C.J. Reports*, 1952, p. 93, at p. 114. He notes, however, that the Court decided that the measures were to lapse 'at the same time' as the Judgment: it was not retroactive, which further emphasizes the independence of the two jurisdictions.

⁴ Cf. his classification in the *Northern Cameroons* case, *I.C.J. Reports*, 1963, p. 15, at pp. 102-6.

account of the absence of the necessary consents, it must refuse to indicate interim measures. 'But there is room for some argument as to the basis on which it would be proper for the Court to find that its lack of jurisdiction was so obvious and apparent as to be clear beyond doubt; and as this must evidently depend very much on the circumstances, it is probable that no certain answer to the question can be given.' On the whole, he prefers the 'Lauterpacht' test of whether there is in existence an instrument *prima facie* conferring jurisdiction on the Court, and no reservations clearly excluding that jurisdiction.¹ Not only should the Court refuse to indicate interim measures on the strength of a purely hypothetical possibility that it might subsequently acquire jurisdiction on the basis of *forum prorogatum*; it should also refuse them where the possibility of jurisdiction is too remote. He agrees with Lauterpacht that to do otherwise would 'open the door to abuse by enabling States with no more than a flimsy claim to the jurisdiction of the Court to obtain an interim Order limiting severely and for a relatively prolonged period the freedom of action of the State concerned'.² In short, Sir Gerald would draw the line below Case 8 in our list.

Shihata takes the view that what the Court decided in the *Anglo-Iranian* and *Interhandel* cases was that a valid seisin is all that is practically required before interim measures can be indicated (provided, of course, that the circumstances of the case are such as to justify such measures).³ It is submitted that this is incorrect; careful analysis of the Court's statements and of the facts of the two cases reveals that the Court did not commit itself to so wide a proposition.⁴ So far as policy is concerned, he disapproves of the adoption of so liberal a test.

The attitude of the Court as expounded above is not free from criticism, especially as the jurisdiction to indicate interim measures may be exercised, as both the Rules and the practice of the Court affirm, *proprio motu*, and need not be confined to the measures requested. The noncompliance of Iran in the only case where the present Court has indicated interim measures under its standing criterion, is particularly instructive. One may expect, therefore, that the Court may be persuaded in the future to move in the direction devised by Judges Badawi and Winiarski in the *Anglo-Iranian Oil Co.* case, adopting a stricter requirement for the exercise of its jurisdiction to indicate interim measures of protection.⁵

As has been seen, this prediction, made in 1965, has not been borne out by events.

EVALUATION

This review of the pleadings, judicial pronouncements and literature has revealed relatively little agreement. Naturally enough, everyone agrees that

¹ Op. cit. (above, p. 304 n. 3), pp. 113-14.

² Op. cit. (above, p. 271 n. 2), p. 111.

⁴ Above, pp. 270-2, 274-5.

³ Op. cit. (above, p. 275 n. 4), pp. 170-80.

⁵ Op. cit. (above, p. 275 n. 4), p. 180.

interim measures may be indicated (other circumstances permitting) after the Court has found that it is competent¹ to determine the merits but may not be indicated after a negative finding. But as to the legitimacy or appropriateness of the Court's indicating interim measures in the intermediate cases—that is, before a determination by the Court as to its jurisdiction—opinions range from the extremely liberal test proposed by Counsel for Pakistan in the *Pakistani Prisoners* case² to the extremely conservative one espoused by Judge Forster in the *Nuclear Tests* cases.³ The proponents of the various tests rely on a number of arguments, without examining their implications very deeply. It is necessary to explore these arguments before forming a view as to what should be the proper test.

The starting-point must be an examination of the connection between jurisdiction to determine the merits and the source of the Court's power to indicate interim measures of protection. For some, they are very closely, perhaps even inextricably, linked. For example, Judges Winiarski and Badawi Pasha, in the *Anglo-Iranian Oil Co.* case, observed:

In international law it is the consent of the parties which confers jurisdiction on the Court; the Court has jurisdiction only in so far as that jurisdiction has been accepted by the parties. The power given to the Court by Article 41 is not unconditional; it is given for the purpose of the proceedings and is limited to those proceedings. If there is no jurisdiction as to the merits, there can be no jurisdiction to indicate interim measures of protection.⁴

Similarly, Judge Forster in the *Nuclear Tests* cases observed:

To exercise this power conferred by Article 41, the Court must have jurisdiction. Even when it considers that circumstances require the indication of provisional measures, the Court, before proceeding to indicate them, must satisfy itself that it has jurisdiction . . . In my view the Court does not have two distinct kinds of jurisdiction: one to be exercised in respect of provisional measures and another to deal with the merits of the case.⁵

It is, of course, true that there is no power to indicate interim measures if it has definitely been established that there is no jurisdiction over the merits, if only because in such circumstances there will be no further proceedings in the case. It does not, however, logically follow that the Court must enter into an examination of its jurisdiction before entertaining a request for interim measures; this would only be necessary if the power to indicate such measures came from the same source as the power to determine the merits.

¹ In the present context, references to competence or jurisdiction also include admissibility. The relevance of the distinction between the two concepts in the context of Article 41 of the Statute will be discussed below, pp. 315–18.

² Above, pp. 300–1.

⁴ *I.C.J. Reports*, 1951, p. 89, at p. 97.

³ Above, pp. 290–1.

⁵ *Ibid.*, 1973, p. 99, at p. 111. Cf. also Judge Gros, *ibid.*, p. 120, and Judge Lauterpacht, *Interhandel* case, *ibid.*, 1957, p. 105, at p. 119.

It does not. The power to adjudicate on the merits is founded on the consent of the parties, given *ante hoc* in declarations of acceptance under the Optional Clause or in some treaty or convention in force between them, *ad hoc* in a *compromis*, or *post hoc* by *forum prorogatum*. The power of the Court to indicate interim measures of protection, on the other hand, is part of its *incidental* jurisdiction, like its power to determine its own jurisdiction (Article 36 (6) of the Statute) and its power to allow third-party intervention (Articles 62 and 63).¹ For some, this incidental jurisdiction is inherent in the nature of the judicial process, and would exist even without the consent of States,² but in the present context it is unnecessary to determine whether this view is correct, for the consent of States has in fact been given. Each member of the United Nations, each non-member State that becomes a party to the Statute of the Court, and each State that obtains access to the Court, agrees to be bound by the whole Statute, including Article 41.³ The principle that the jurisdiction of international tribunals over States depends on their consent is thus respected, but this act of consent is not the same as that required to found the substantive jurisdiction of the Court.⁴

This is a point of fundamental importance, for it means that the jurisdiction of the Court to indicate interim measures is not dependent on its competence to determine the merits in the sense that the former can only be exercised after it has been found that the latter exists. In other words, the Court has the right to act under Article 41 of its Statute *before* reaching a final decision on the question of its substantive jurisdiction, and the mere fact that there may be doubts as to its existence does not, of itself, mean that Article 41 cannot be brought into play.

This contention is supported by the fact that the Statute and Rules of Court lay down different procedures for dealing with preliminary objections on the one hand, and requests for interim measures on the other.⁵

¹ See above, p. 305.

² Cf., e.g., *The Gramophone Co. Ltd. v. Deutsche Gramophon A.G. & Polyphonwerke A.G.* (1922), *M.A.T.*, vol. 1, p. 857; *Veerman v. German Federal Republic* (1957), *I.L.R.* 25 (1958), p. 522.

³ Cf. U.N. Charter, Article 93; Statute, Article 35; Security Council Resolution 9 (1946), 15 October 1946. Other instruments may also confer, or confirm, the Court's power to indicate interim measures: for example, Article 33 of the General Act of 1928 (*U.N. Treaty Series*, vol. 320, p. 244); Article 33 of the Revised General Act of 1949 (*ibid.*, vol. 71, p. 102); and Article 31 of the European Convention for the Peaceful Settlement of Disputes of 1957 (*ibid.*, vol. 320, p. 244). Cf. above, p. 286.

⁴ Cf. Fitzmaurice, *op. cit.* (above, p. 304 n. 3), p. 107. Stone, *Legal Controls of International Conflict* (1959), p. 132 observes that Article 41 of the Statute 'represents the only respect in which, by mere acceptance of the Statute, a State renders itself liable to the imposition of obligations by Court action'.

⁵ The distinction between the two procedures was underlined by, for example, the Roumano-Hungarian Mixed Arbitration Tribunal in the *Ungarische Erdgas* case (above, p. 265) and by the majority of the International Court of Justice in the *Interhandel* case (above, p. 275). Cf. also Dumbauld, *op. cit.* (above, p. 259 n. 2), pp. 165, 186; Hammarskjöld, *Jurisdiction Internationale* (1938), p. 313.

Article 36 (6) of the Statute envisages the possibility of objections to the Court's assumption of jurisdiction, and Rule 67 of the Rules of Court lays down the procedure to be followed in dealing with such objections. This normally involves the submission of a written Memorial, preliminary objection and observations, followed by an oral hearing, and is necessarily protracted. By contrast, the only written pleading required in the interim measures procedure is the—usually brief—request itself, and, although the Court may indicate such measures only after both parties have been given the opportunity of presenting their observations on the subject,¹ urgency is of the essence of the procedure,² as the Court has recently emphasized.³ For the Court to put off interim measures proceedings until after the termination of the proceedings on jurisdiction would, then, be inconsistent with the distinction which exists between the two procedures and the urgency which attends the latter. Such a postponement may well also, in the words of Lauterpacht, 'render the remedy illusory as the result of the destruction of the object of the dispute or for other reasons'.⁴

To conclude that the Court is not obliged to satisfy itself that it possesses jurisdiction over the merits is not, however, the same as saying that the jurisdictional issue should not be considered at all at the interim measures stage. It may, it is true, be inconvenient to enter upon such a consideration, because the Court can hardly hope to do justice to what are often complicated questions on the limited pleadings, and in the short time available to it under the Rule 66 procedure. Moreover, it may involve a certain amount of duplication, since the objections to jurisdiction will have to be re-examined in a subsequent phase of the proceedings. Nevertheless, unless the danger to the plaintiff's rights is so imminent that even a short prolongation of the interim measures proceedings to consider the jurisdictional issue may be fatal, there is no overwhelming reason why the Court should not consider it, at least summarily, and good reason why it should.⁵

What the conclusion, that the Court does not have to be finally *satisfied* as to its substantive jurisdiction, *does* mean is that, at least in principle, the Court has the power to consider indicating interim measures even in Cases 2 to 10 on our list, i.e. when it is dealing with probabilities, not

¹ Rule 66 (8) of the Rules of the Court.

² Paragraphs (2) and (3) of Rule 66 of the Rules of Court provide:

2. A request for the indication of interim measures of protection shall have priority over all other cases. The decision thereon shall be treated as a matter of urgency.

3. If the Court is not sitting, the Members shall be convened by the President forthwith. Pending the meeting of the Court and a decision by it, the President shall, if need be, take such measures as may appear to him necessary in order to enable the Court to give an effective decision.

³ In the *Pakistani Prisoners* case, *I.C.J. Reports*, 1973, p. 328, at p. 330.

⁴ *Op. cit.* (above, p. 271 n. 2), pp. 110–11. The point was conceded even by the dissenting judges in the *Anglo-Iranian* case, above, pp. 272–3.

⁵ See below, pp. 311–13.

certainties. In other words, doubts about the Court's competence to determine the merits are not fatal to its power to indicate interim measures, though they may be relevant when considering whether to exercise it. How far they are relevant is in fact provided for—though not expressly—in Article 41 of the Statute and in the Rules of Court made thereunder.

In the first place, Rule 66 (1) of the Rules of Court provides for interim measures to be requested 'at any time during the proceedings'. If the Court has not been validly seized of a dispute, for example because an attempt to obtain the respondent's consent to *forum prorogatum* has failed, it seems that there will be no 'proceedings' in respect of which the request may be entertained.¹ If so, the Court may not indicate interim measures in respect of at least some of the cases which fall within the Case 10 on our list.²

Secondly, Article 41 of the Statute permits the Court to indicate interim measures 'if [and presumably *only* if] it considers that circumstances so require'. For the most part, the circumstances which the Court will consider relate to the urgency of the case, the likelihood of prejudice to the rights of one or other of the parties, the possibility of remedying such prejudice by the award of damages, and other, similar, matters. However, the degree of likelihood of the Court's having competence to determine the merits is also a 'circumstance' which, it is submitted, may legitimately, and sometimes must, be taken into account when considering a request under Article 41.³

What weight is to be given to this circumstance? Obviously, the mere fact that the respondent has objected, formally or informally, to the jurisdiction of the Court cannot conclude the matter, for, as the Hungarian-Czech Mixed Arbitral Tribunal observed in *Count Hadik Barcoczy v. Czechoslovakian State*,⁴ this would open the door to abuse; it would permit respondents to render the power to indicate interim measures illusory by

¹ See above, p. 303 n. 4.

² The same result can perhaps be achieved by stressing the requirement in Article 41 that there should be 'parties'. It is submitted, however, that one cannot go further, as some have done (e.g. Judges Winiarski and Badawi, above, p. 272), and say that if there is no substantive jurisdiction, there are no 'parties'.

³ Cf. the decision of the Hungarian-Czech Mixed Arbitration Tribunal in *Count Hadik Barcoczy v. Czechoslovakian State* (above, pp. 265-6), and the Separate Opinion of Judge Jiménez de Aréchaga in the *Nuclear Tests* cases (above, pp. 289-90). It may be, however, that if the Court decides that the other circumstances of the case do not warrant the indication of interim measures (for example, if there is no imminent danger to the rights of the parties), it need not go into the question of the likelihood of establishing substantive jurisdiction, which is simply another of the relevant circumstances. If so, it means that the Court need not have examined the jurisdictional issue in detail in the *Interhandel* case (above, pp. 274-8), when it was satisfied that the other circumstances did not warrant the indication of interim measures. It also means that the Court was right in not going into the question of its competence in the *Prince von Pless, Polish Agrarian Reform*, and *Pakistani Prisoners* cases (above, pp. 267, 268, 301, respectively), though, particularly in the latter, it is arguable that the dismissal of the request should have been based on an appreciation of the relevant circumstances rather than on a 'pre-pre-preliminary' point of procedure.

⁴ Above, pp. 265-6.

simply raising an objection, however ill founded, thereby prejudicing the position of the plaintiff. On the other hand, for the Court to treat such an objection too lightly might prejudice the position of the respondent.

Whether granting or refusing a request for interim measures, the Court has carefully and consistently emphasized that 'the decision given in the course of the present proceedings in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the merits themselves and leaves unaffected the right of the Respondent to submit arguments against such jurisdiction or in respect of such merits',¹ and the same view has in general been taken even by Judges who otherwise disagreed with the Court's reasoning.² The statement is, of course, true in the sense that a finding at the interim measures stage on the question of the Court's substantive jurisdiction does not have the status of *res judicata*; it is merely provisional, and if the Court should later find that it is without such jurisdiction, it will 'raise' the measures indicated.³ But because the decision on provisional measures does not *prejudge* the jurisdictional issue or the merits, it should not be assumed that it cannot *prejudice* the position of the parties. It can, in fact, do so in two ways.

First, however much the Court stresses that it is leaving the question of competence open, an expression of opinion, however tentative and provisional, may well have an adverse effect on the position of the party whose submissions have been rejected. Even if members of the Court are able to keep a completely open mind,⁴ the finding is bound to weaken the bargaining position of one of the parties if there are negotiations for a settlement. The stricter the criterion adopted by the Court, the greater will be the possible prejudice to the respondent; for example, if the Winiarski-Badawi test is adopted, the Court, in indicating interim measures, will have found, albeit provisionally, that jurisdiction over the merits is reasonably probable. Conversely, the more liberal the criterion adopted, the greater the chance of prejudice to the position of an applicant who is found to have failed even to show that the Court's jurisdiction is, for example, reasonably arguable.

Secondly, and more importantly, the decision of the Court to grant or to withhold interim measures may prejudice the *factual* position of the parties. On the one hand, to deny the applicant interim relief may well 'as the result of the destruction of the object of the dispute or for other reasons',⁵ render illusory any remedy ultimately awarded. (It may also be added that it would be detrimental to the Court's prestige for it to refuse to indicate

¹ e.g. in the *Fisheries Jurisdiction* cases, *I.C.J. Reports*, 1972, p. 12, at p. 16. The inclusion of reference to possible questions relating to the merits themselves was introduced for the first time in these cases.

² e.g. Judges Winiarski and Badawi Pasha in the *Anglo-Iranian* case, *ibid.*, 1951, p. 89, at p. 97.

³ As in the *Anglo-Iranian Oil Co. Jurisdiction* case, *ibid.*, 1952, p. 93.

⁴ Which Lauterpacht doubted, *op. cit.* (above, p. 271 n. 2), pp. 255-6.

⁵ *I.C.J. Reports*, 1951, pp. 110-11.

interim measures because of doubts as to its jurisdiction, only to find, at a later stage, that it was competent after all, but that irreparable prejudice had meanwhile been done to the applicant's rights.) On the other hand, as Lauterpacht also observes, 'compliance with the Order may prevent the defendant State—conceivably for a prolonged period—from exercising its legitimate rights in a matter with regard to which the Court may eventually find that it has no jurisdiction'.¹ This statement requires some qualification, for it by no means follows that, because the Court has no jurisdiction, the 'rights' which the respondent is purporting to exercise are 'legitimate'. But since it would be equally unsafe to assume that they are illegitimate, it has to be conceded that the risk of prejudice to the respondent is a real one. In theory, though probably not in practice, the risk of prejudice to the respondent is made more serious by the fact that paragraphs 4 and 6, respectively, of Rule 66 of the Rules of Court allow the Court to indicate interim measures *ultra petita* and *proprio motu*,² though not, it should be added, *ex parte*—unless, of course, the respondent chooses not to appear.³

Admittedly, a similar risk of prejudice to the defendant exists when municipal tribunals order interim measures of protection, but there are two important differences between the position of such tribunals and that of the International Court of Justice. First, as Judges Winiarski and Badawi Pasha pointed out in the *Anglo-Iranian Oil Co.* case, municipal tribunals have jurisdiction without the consent of the parties, and if the particular tribunal which is asked to grant measures of protection is without jurisdiction to decide the merits, some other tribunal will normally possess it; whereas the jurisdiction of the International Court to determine the merits depends on the consent of both parties.⁴ Secondly, while most municipal tribunals are in a position to mitigate the risk of damage to the defendant by making it a condition of granting interlocutory relief that the plaintiff undertakes to compensate the defendant for any damage which he may suffer by having

¹ *I.C.J. Reports*, 1951, pp. 110–11.

² Shihata, *op. cit.* (above, p. 275 n. 4), p. 180.

³ Whether there is any tactical advantage to be gained in refusing to appear is something which it is beyond the scope of this article to discuss, and which will in any case depend on the circumstances. One fact is worth noting, however. By refusing to appear on the ground that the Court's lack of jurisdiction to determine the merits was manifest and incontestable, Iran, Iceland, France and India in effect gave up the opportunity of arguing about the degree of probability of jurisdiction which should have been required before interim measures were indicated, in the event of the Court's not considering the jurisdictional issue to be as clear-cut as they contended. In other words, they enabled the Court to adopt a liberal test virtually by default. To some extent, the same may be said of the *Interhandel* case, where the arguments of the United States Co-Agents on this point went little further than the assertion that, because of the 'automatic reservation', it was evident *a priori* that the Court was without jurisdiction: *Interhandel* case, *I.C.J. Pleadings* (1959), pp. 453–4.

⁴ Above, p. 272. They also distinguished the decisions of the Mixed Arbitral Tribunals, on the ground that 'these tribunals, as joint organs of two States, differ both as to their character and as to their procedure from an international tribunal, and, therefore, from the International Court of Justice, and there is, consequently, nothing to be learned from their precedents', *I.C.J. Reports*, 1951, p. 89, at p. 97.

to comply with the order, should the court subsequently find in the defendant's favour on the merits,¹ there is nothing in the Statute or the Rules of Court which expressly confers a like power on the International Court of Justice, and, even if it could be implied, it has certainly never been exercised.²

If then, a respondent State complies with the interim measures indicated by the Court, despite its denial that it has given the Court the right to determine the merits, and this denial is subsequently found to have been justified, it will, to some extent, have good cause for complaint: with the benefit of hindsight, one would have to agree that, for one or two years at the least, it will have suffered an impairment of its sovereignty by the Court in a dispute which the Court had no power to settle—and this without an indemnity.³ Such an outcome might also damage the Court's reputation. If, on the other hand, the defendant State ignores the measures indicated by the Court, it runs the risk of being regarded as having acted illegally, or at any rate of being penalized in damages, should the Court subsequently find for the applicant on the merits.⁴ (Moreover, should the Court and the Security Council fail to take steps to ensure compliance with the measures indicated, this is bound to have a serious effect on the prestige of the former). It was such considerations that led Rosenne to suggest that the power to indicate interim measures ought, perhaps, 'to be more closely integrated with the principal jurisdiction to deal with the case on the merits'.⁵

It follows, therefore, that the risk of prejudice to one or other of the parties is a real one, which cannot be glossed over by the simple incantation of the formula that the grant or refusal of interim measures does not prejudice subsequent decisions in other phases of the proceedings. The Court must weigh up the risks to both parties and try to achieve the fairest solution. This involves determining what the risks in fact are, which in turn necessitates the consideration of a number of factors.

One such factor relates to the degree of probability of substantive jurisdiction which the Court finds to exist on a summary examination; and it is within this context, it is submitted, that the jurisdictional issue may—and should—properly be considered. If there is a strong chance of jurisdiction on the merits, the risk of prejudice to the rights of the plaintiff will be relatively greater, if interim measures are not indicated, than the risk of prejudice to the rights of the defendant, if they are. Conversely, if there is

¹ Cf., e.g., Spry, *Equitable Remedies* (1971), pp. 435–41.

² It is hoped to consider this question, which has been virtually ignored by the writers, on a future occasion.

³ It should be emphasized, however, that the mere fact that the Court turns out not to have had jurisdiction over the merits does not mean that the indication of interim measures was unlawful, for the source of the Court's power in respect of such measures is not the same as the source of its power to determine the merits; see above, pp. 307–8.

⁴ Cf., e.g., Barile, *op. cit.* (above, p. 303 n. 4), p. 154.

⁵ Above, pp. 304–5.

little prospect of a positive finding on jurisdiction, there will be little prejudice to the plaintiff in refusing interim measures, because the Court will probably not be in a position to grant it a remedy on the merits at the end of the day, whereas the granting of interim measures may cause substantial prejudice to the interests of an unwilling defendant.¹

It is perhaps possible to deduce from this that, in general, interim measures may be indicated (other circumstances permitting) if there is a very strong chance that the Court will have jurisdiction (i.e. in Cases 2, 3 and, probably, 4 on our list). There is, in fact, a general consensus of judicial and scholarly opinion on this, except in so far as the dissenting opinions of Judges Forster, Gros and Ignacio-Pinto in the *Nuclear Tests* cases may be interpreted as requiring the Court to be completely satisfied as to its jurisdiction.² The analysis in the previous paragraph also suggests that interim measures ought not, generally, to be indicated if the possibility of jurisdiction is remote (i.e. in Cases 10 and, probably, 9 on our list). Again there is near-unanimity on this point; no judge has committed himself to a more liberal test, and the only other persons to have done so are Niemeyer,³ the Agent for New Zealand in the *Nuclear Tests* cases,⁴ and Counsel for Pakistan in the *Pakistani Prisoners* case.⁵ However, as *Interhandel*⁶ demonstrates, where Case 9 is concerned, there may well be room for disagreement as to whether, on the facts of the particular case, the title of jurisdiction relied on is indeed 'very unlikely to prove adequate'⁷ or, to borrow the words of the Court,⁸ 'the absence of jurisdiction is manifest'.

However, establishing widely acceptable and generally applicable⁹ rules for dealing with requests falling within Cases 1 to 4 and 9 to 11 on our list, does not solve the problem of what to do in the intermediate cases, where the difficulty and the disagreement are greater. Those who are concerned with avoiding overlap between the interim measures and preliminary objections procedures, and with avoiding the possible prejudice to the applicant which delay or a refusal to grant interim measures may entail, will favour a liberal test, such as that used by the Mixed Arbitral Tribunals,¹⁰ refined by Judge Lauterpacht,¹¹ and apparently adopted by the

¹ It was no doubt for this reason that the Hungarian-Czech Mixed Arbitral Tribunal observed in the *Count Hadik Barcochy* case that a seriously contested objection to jurisdiction is a factor making for prudence when a tribunal is considering whether to indicate interim measures—see above, pp. 265–6. Cf. also Hudson, above, p. 303.

² Above, pp. 290–6.

³ Above, p. 270.

⁴ Above, p. 285.

⁵ Above, p. 301. Rosenne should *not* be included; although he interprets the Court's decisions as indicating a readiness to go further than Case 8, he does not approve; see above, pp. 304–5.

⁶ Above, pp. 274–8.

⁷ Above, p. 263.

⁸ In the *Fisheries Jurisdiction* cases; above, p. 280.

⁹ Even these rules may not be universally applicable, for in extreme cases the magnitude of the risk of prejudice to one of the parties may justify divergence from them.

¹⁰ Above, pp. 264–6.

¹¹ Above, pp. 276–8.

International Court of Justice¹—a test which would permit the indication of interim measures in Cases 1 to 8 on our list. On the other hand, those who are more anxious to avoid the possibility of prejudice to a defendant who claims not to have given the Court jurisdiction to determine the merits will naturally prefer a stricter test, such as that espoused by the dissenters in the *Anglo-Iranian Oil Co.* case.²

It is submitted that there is no objective or rational criterion whereby one view should be preferred to the other *as a general rule*. Indeed, to adopt any sort of general rule in this intermediate area may well be the wrong approach, for it is insufficiently responsive to the particular circumstances of each case and to the other elements that go to make up the 'risk of prejudice' to either party. It is possible to imagine a case in which interim measures are requested in order to prevent the defendant State from carrying out its avowed intention of proceeding immediately to dump highly dangerous bacteria in an area of sea two miles off the applicant's coast, but the title of jurisdiction adduced seems *prima facie* highly unlikely to succeed, though the opposite is still arguable. In other words, it is a case which looks strong on the merits, where there is great urgency, and where the possible harm to the plaintiff if interim measures are not indicated is very great and far outweighs the possible inconvenience to the defendant of having to dump the bacteria elsewhere or keep them pending the final decision of the Court.³ Here there would seem to be a strong case for granting interim measures, even though the probability of jurisdiction over the merits seems fairly remote. If, on the other hand, the substance to be discharged were less noxious or if the plaintiff's sovereignty over the area were more questionable, the Court might be justified in refusing to indicate interim measures unless a higher probability of substantive jurisdiction could be established. To concentrate on the jurisdictional issue, and to lay down a hard-and-fast rule as to what degree of probability of jurisdiction will suffice, may not be what is required. The Court must also take into account such questions as the prospects of a decision on the merits in the applicant's favour, the imminence of the harm against which the interim measures are sought, and the magnitude of the interests at stake on both sides.

(a) *The prospects of success on the merits*

As Judges Winiarski and Badawi Pasha observed in the *Anglo-Iranian Oil Co.* case, even in municipal law, the exceptional character of the remedy

¹ Above, pp. 280-2, 286-8.

² Above, pp. 272-4.

³ Of course, it is always possible that the measures might be indicated but ignored by the defendant, as in fact happened in the *Anglo-Iranian*, *Fisheries Jurisdiction* and *Nuclear Tests* cases. However, it is submitted that it would be improper for a Court to take the prospects of compliance with its interim measures into account when deciding whether circumstances warrant indicating them.

means that, if it seems to the judge very likely that the applicant will fail in the main proceedings, he will refuse to grant the relief asked for.¹ Similarly, the purpose of the indication of interim measures by the International Court is, in the words of Article 41 of the Statute, 'to preserve the respective *rights* of either party'. Clearly these rights do not have to be fully vindicated at the interim measures stage, but on the other hand, if there is no reasonable prospect of a decision on the merits in the plaintiff's favour, the measures ought not to be indicated.

Obviously, there are limits on how far the Court can go into the merits at this stage. If the interim measures procedure is ill suited to a lengthy examination of *jurisdictional* issues, it is even less appropriate for consideration of what are often very complex and controversial questions of law and fact. Nevertheless, the degree of likelihood on the merits in the applicant's favour, like the prospect of substantive jurisdiction, is an element relevant to a consideration of the risk of prejudice to the position of one or other of the parties. Accordingly, the Court must deal with it, albeit very summarily.

In fact, the Court did so in the *Anglo-Iranian Oil Co.* case, where, as we have seen, it brushed aside an ill-conceived objection to the *locus standi* of the British Government, and rejected another objection on the ground that it could not be accepted *a priori* that a claim relating to expropriation and the denial of justice 'falls completely outside the scope of international jurisdiction'.² It dealt in a similar manner with an Icelandic suggestion, in the *Fisheries Jurisdiction* cases, that the applicant governments could not seek protection for the rights of their fishermen.³

It also touched on the merits in the *Nuclear Tests* cases, where, after satisfying itself that the jurisdictional titles adduced by the applicants 'appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded', it decided to 'proceed to examine the Applicant's request for the indication of interim measures of protection'.⁴ Then, recalling that the purpose of Article 41 is to preserve the respective rights of the parties, it continued:

Whereas it follows that the Court in the present case cannot exercise its power to indicate interim measures of protection unless the rights claimed in the Application, *prima facie*, appear to fall within the purview of the Court's jurisdiction . . .

Summarizing the claims of each of the Applicants, it made the brief comment that ' . . . it cannot be assumed *a priori* that such claims fall completely outside the purview of the Court's jurisdiction, or that the [Applicant] Government . . . may not be able to establish a legal interest in respect of

¹ Above, p. 272. Cf. also Judge Gros in the *Nuclear Tests* cases, above, p. 293.

² Above, pp. 270-2.

³ *I.C.J. Reports*, 1972, p. 12, at p. 15.

⁴ *Ibid.*, 1973, p. 99, at p. 102. Cf. above, pp. 288-9.

these claims entitling the Court to admit the Application';¹ and then proceeded to examine whether the other circumstances of the case—and in particular the risk of harm to the Applicants—justified the indication of interim measures.

In his dissenting opinion, Judge Gros expressed his dissatisfaction with the Court's handling of this issue; for him, the question of the existence of a cause of action and of *locus standi* raised issues of admissibility which were entitled to absolute priority, even over questions of competence.² With respect, it is submitted that for the Court to have settled questions of admissibility before entertaining the request for interim measures would have been entirely incompatible with the urgency of the Article 41 procedure, particularly in view of the alleged risks to the physical well-being of the inhabitants of the territories concerned. Moreover, to introduce the concept of admissibility *as such* into interim measures proceedings may well be out of place. Certainly, the Court ought not to indicate interim measures unless the applicant has at least an arguable case on the merits, but this is because Article 41 impliedly requires the rights in question to be at any rate *possible*, and because the degree of likelihood of a decision on the merits is one of the factors to be taken into account when evaluating the possibility of prejudice if interim measures are granted or withheld. The stronger the probability of an ultimate decision in the plaintiff's favour, the more ready the Court should be (other things being equal) to indicate interim measures; but this is not the same as requiring the Court to be completely satisfied as to the admissibility of the claim before indicating interim measures. In the present writer's view, therefore, the Court was justified in not adopting Judge Gros's approach.

It was, however, wrong in drawing the line in the way it did between the question of the probability of substantive jurisdiction on the one hand, and the issues of the legal character of the dispute and the *locus standi* of the Applicants on the other. It correctly treated the latter issues as relevant to its consideration of whether the circumstances of the case permitted the indication of interim measures, but it also treated the former as a matter which it had to dispose of before examining the 'circumstances'—in other words, as going to the jurisdictional basis of its power under Article 41 of the Statute. It has already been submitted that this is the wrong approach:³ so long as the procedural requirements have been met and it is properly seized, the Court has the jurisdiction to examine whether circumstances warrant the indication of interim measures, and the purpose of considering what is the likelihood of a positive finding on substantive jurisdiction is that

¹ *I.C.J. Reports*, 1973, p. 99, at 103.

² *Ibid.*, pp. 120–3. Cf. also the dissenting opinions of Judges Petrán and Ignacio-Pinto, *ibid.*, pp. 127 and 130–3, respectively.

³ Above, pp. 307–8.

this will be relevant to an assessment of the danger of prejudice to one or other of the parties. In other words, the Court would seem to have been technically incorrect in dealing with the jurisdictional issue as one which it had to settle before examining the circumstances of the case.

(b) *The imminence of the anticipated harm*

The next element to consider in assessing the likelihood of prejudice to the parties is the imminence of the anticipated harm to the rights of the applicant. Of course, unless the case is urgent, the Court will not indicate interim measures anyway—as the *Prince von Pless*, *Interhandel* and *Pakistani Prisoners* cases demonstrate.¹ However, even if the case is urgent enough to satisfy this test, there are still degrees of urgency, and it is submitted that the less imminent the danger seems, the more the Court could demand to be satisfied that it is likely to have jurisdiction over the merits. Conversely, the closer the danger, the more the Court might be justified in dispensing with all but a cursory examination of whether any obvious defect appears ‘on the face’ of the jurisdictional title, especially since, as Lauterpacht points out, any other test could necessitate an examination, not only of the objections raised by the defendant, but all other possible ones.² In other words, it may be that, other things being equal, the degree of probability of jurisdiction which the Court requires should be roughly in inverse proportion to the degree of urgency.³

(c) *The magnitude of the interests at stake*

As has been demonstrated by the two illustrations given above,⁴ the magnitude of the damage which could ensue from the grant or refusal of an interlocutory remedy is also a factor which should be taken into account by the Court. Both the relative and the absolute importance of the interests is involved: the relative, because the Court has to ascertain which party is likely to suffer the greater hardship as the result of its decision; and the absolute, because each party will suffer less where its minor interests are at stake than where its major ones are.⁵

There may be other factors,⁶ but these—the possibility of a decision in the applicant’s favour on jurisdiction and on the merits, the imminence of

¹ Above, pp. 267, 274, 301 respectively.

² Op. cit. (above, p. 271 n. 2), p. 255 n. 42.

³ Judge Gros took a different view in the *Nuclear Tests* cases; see above, p. 292.

⁴ p. 315.

⁵ The loss anticipated by the State requesting interim measures must, in any case, be of such a kind that pecuniary compensation would not be an adequate remedy, for otherwise the measures may not be indicated—*Denunciation of the Sino-Belgian Treaty* case, P.C.I.J., Ser. A, No. 8, p. 7.

⁶ e.g. it may be relevant to determine who is trying to change the *status quo*. However, this depends on how the *status quo* is determined, which can be controversial. For example, the suggestion of Judge Gros that it was the Applicants in the *Nuclear Tests* cases who were trying to change the *status quo* (above, p. 294) is, with respect, at least debatable.

the anticipated harm, and the magnitude of the interests at stake—are the principal matters to be taken into account by the Court in weighing up the possibility of prejudice to the rights of the parties, which, in turn, is one of the most relevant ‘circumstances of the case’ to be taken into account when dealing with a request for interim measures. To lay down in advance a hard-and-fast rule for dealing with one of these factors—the possibility of jurisdiction—is to fail sufficiently to take into account the great variability of the others from case to case. If the other circumstances suggest very strongly that interim measures should be indicated, the Court may be justified in indicating them even in the face of substantial—though not overwhelming—doubts as to its substantive jurisdiction. If, on the other hand, the other circumstances make granting the request only marginally preferable to refusing it, the Court may well be justified in examining the question of its jurisdiction more closely and insisting on a greater degree of probability.

The disadvantage of this flexible approach is that it gives no clear guidance to potential applicants for interim measures. Its advantage is that it makes what is, after all, an exceptional power more responsive to the particular circumstances of each case, enabling the Court to take into account the balance of convenience and the respective rights of *both* parties. It is also more consistent with the letter and spirit of Article 41 of the Statute, which, in empowering the Court to indicate interim measures of protection ‘if it considers that circumstances so require’, is clearly intended to confer upon the tribunal a very wide liberty of appreciation.

A desire to retain this liberty is perhaps one reason why the Court has so far failed to state explicitly how far it is prepared to go in indicating interim measures of protection in cases where its competence to determine the merits, though not manifestly lacking, varies in likelihood from ‘arguable’ to ‘highly probable’.¹ Nevertheless, a *jurisprudence constante* is emerging which favours the liberal test applied by the Mixed Arbitral Tribunals and elaborated by Judge Lauterpacht—a test which allows interim measures to be indicated if the applicant is able to adduce a title of jurisdiction, emanating from the parties, which is not manifestly invalid or rendered inapplicable to the case by restrictions on its scope (including reservations). This test has the virtue that it is normally relatively simple to apply, and excuses the Court from having to examine, in anything but the most summary fashion, complicated jurisdictional issues which will in any event need to be considered more fully at a subsequent stage in the proceedings. Its great drawback is that it is insufficiently responsive to the

¹ No doubt another factor is a wish to avoid prejudging the jurisdictional issue more than is necessary.

great differences which can exist between the circumstances of cases in which interlocutory relief is sought. Its application has already provoked a sense of grievance and a spirit of non-co-operation on the part of respondents which, whether justified or not, may in the long term prove damaging to the prestige of the Court and the acceptance of its jurisdiction by States. It has also resulted in strong dissension within the Court itself, particularly in the *Nuclear Tests* cases. And finally, it may give rise to a rash of embarrassing requests in the future—embarrassing in the sense that, if the Court continues to apply the test uniformly, it could find itself constrained to indicate interim measures imposing heavy burdens on respondents at the behest of applicants whose prospects of ultimately establishing the Court's jurisdiction over the merits are more and more questionable.

This is not a call for the adoption of any of the more conservative tests espoused by some of the commentators and members of the Court, for this would simply mean the replacement of one relatively inflexible rule by another. It is, rather, a plea for the Court not to fetter unnecessarily the discretion given to it by Article 41 of its Statute, and not to tie itself to any rule whose rigidity might impair its ability to take sufficient account of the different circumstances of different cases.

SUMMARY AND CONCLUSIONS

1. (a) The Court's power to indicate interim measures is part of its incidental jurisdiction, and its basis distinct from that of its jurisdiction to decide on the merits of a dispute.
- (b) The procedure for dealing with a request for interim measures is also distinct from the procedure for dealing with preliminary objections.
- (c) A request for interim measures must be dealt with as a matter of urgency; if not, steps may be taken which could render a final judgment wholly or partly ineffective.

Accordingly, the Court is entitled to indicate interim measures even before it has finally determined the question of its jurisdiction over the merits (and of the admissibility of the claim), and even in the face of objections to its jurisdiction (or to admissibility).

2. The decision it takes on the request does not prejudice the decision which it may subsequently reach on jurisdiction, admissibility or the merits.

3. Such a decision may, however, *prejudice* one or other of the parties. For example, if interim measures are granted, the defendant may be prejudiced by having to comply with a decision of a Court which, it contends, is without competence to render a decision on the merits. On the other hand, if the measures are not indicated, the plaintiff may be prejudiced,

for example by the destruction of the object of the dispute. How certain should the Court be of its substantive jurisdiction before indicating the measures?

4. There is fairly general agreement that provisional measures may be indicated (other circumstances permitting) if jurisdiction is probable, but should be refused if the Court manifestly lacks competence.

5. There is considerable disagreement, however, over the proper course to be adopted in cases which fall between these two extremes. From its somewhat oracular pronouncements, the International Court of Justice would seem to have adopted the approach of the Mixed Arbitral Tribunals, as refined by Judge Lauterpacht: the fact that jurisdiction over the merits is not manifestly lacking is, for it, not only a necessary, but also a sufficient condition for the indication of interim measures (other circumstances permitting). On the other hand, this approach has been strongly criticized by individual judges and scholars who have preferred a more conservative approach.

6. To lay down any hard-and-fast test may be wrong, however. Article 41 of the Statute empowers the Court to indicate provisional measures 'if it considers that circumstances so require, . . . to preserve the respective rights of either party'. This obliges the Court to assess, in each particular case, the likelihood of prejudice to each of the parties from the grant, or refusal, of interim protection. This involves taking into account a variety of factors, such as the apparent prospects of success on the merits, the imminence of the danger against which interim protection is sought, and the magnitude of the interests involved on both sides, both relatively and absolutely. Another factor affecting the possibility of prejudice to one or other of the parties is the likelihood of the Court's having substantive jurisdiction, and this, too, must be brought into the equation. If the other circumstances do not warrant the indication of interim measures, *cadit quaestio*; but even if this threshold is crossed, that does not mean that they can be put to one side, and attention focused on the jurisdictional issue alone. There are *degrees* of urgency, of seriousness of anticipated harm, and so on; this should make a difference to the way in which the Court approaches the jurisdictional issue. If the surrounding circumstances militate very strongly in favour of indicating interim measures, the Court would be justified in granting them even if the objections to jurisdiction seem very strong indeed (though not, of course, if they are *manifestly* well founded). If, on the other hand, the case for indicating the measures seems only marginally stronger than the case for refusing them, the Court could reasonably insist on a higher degree of probability; in other words, if the balance tilts only slightly towards indicating provisional measures, it should be tipped the other way if it seems unlikely that the Court will be found to

be competent to determine the merits. The greater the improbability, the more the balance should swing against interim measures.

7. Accordingly, it is respectfully submitted that the Court ought not to fetter its discretion to determine whether 'circumstances require' the indication of interim measures by laying down a hard-and-fast rule as to what degree of likelihood of substantive jurisdiction will or will not satisfy it ('manifest' cases apart). Policy, as well as the letter and spirit of Article 41 of the Statute, call for a flexible approach, in which all relevant factors are taken into consideration and given their proper weight.

THE CONTENT OF THE RULE AGAINST ABUSE OF RIGHTS IN INTERNATIONAL LAW*

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THAT no person may abuse his rights has long been accepted in theory as a principle of international law. Sir Hersch Lauterpacht was one of the earlier writers to accept it. In *The Function of Law in the International Community*¹ he saw 'abuse of rights' as a general means of bringing every action of State sovereignty under international law, though as a matter of policy he was prepared to see some areas of action left untouched.² But for him, abuse of right was more than a general principle of law, it was one of the two prime means of effecting peaceful change in the international community. To say that the abuse of rights was prohibited was not enough. Content must be given to the principle. Those who denied the practical validity of the principle did so because they saw no sufficiently defined content capable of application.

A KEY TO THE CONTENT

If one starts from the premiss that State sovereignty dictates that a State may do what it will, an immediate qualification is necessary. A State cannot act in the territory of another without permission.³ One may, perhaps, go a stage further and say that a State cannot act in a way which prevents another State from doing what *it* wills. Alternatively, one can refuse to take that step—English municipal law does not in general take it.⁴ One can let the burden of a person's action lie where it falls. But State sovereignty does not permit this.⁵ At the same time, the proposition that a State cannot act in a way which prevents another State from acting as it will cannot stand without qualification. There must be occasions where a State can lawfully act even though it prevents another State from acting. What, then, are the limits to a State's right to act as it will?

States possess powers to act for which international law does not dictate a manner of use. In *The Lotus*,⁶ the Permanent Court of International

* © Dr. G. D. S. Taylor, 1974.

¹ (1933), Chap. 14.

² *Ibid.*, pp. 304–6.

³ *The Lotus*, P.C.I.J., 1927, Ser. A, No. 10.

⁴ *Bradford Corporation v. Pickles*, [1895] A.C. 587 (H.L.).

⁵ See F. de Castro, 'La Nationalité, la Double Nationalité et la Supra-Nationalité', *Recueil des cours*, 102 (1961), p. 515, at pp. 579–80.

⁶ P.C.I.J., 1927, Ser. A, No. 10, at p. 19.

Justice described the greatest of such areas—that of domestic jurisdiction—as a ‘discretion’ (a term used more recently by Sir Humphrey Waldock in the same connection)¹ and as a matter of ‘politics’. It is easy to think of such areas of State power as areas of ‘no law’; yet they are this only in a sense. The word ‘discretion’ provides a clue, seen by Judge Azevedo in *Conditions of Admission of a State to the United Nations* (Advisory Opinion):²

Objection to the political aspect of a case is familiar to domestic tribunals in cases arising from the discretionary action of governments, but the Courts always have a sure means of rejecting the *non liquet* and of acting in the penumbra which separates the legal and the political . . .

In municipal administrative law discretions are limited but the courts do not exercise a complete control over the very action taken. They leave to the person possessing the discretion a margin of appreciation and examine only such questions of law as may be spelled out from the legislation conferring the discretion. International tribunals may be expected to operate in a similar way. They are in an identical position so far as their composition and procedure are concerned: they are experts in law operating by the adversary system, and not experts in government and politics acting by consultation, advice and other informal means.

Today, English administrative law presents the most highly developed law relating to the abuse of discretion—not because English administrative law is a highly developed system. Rather it is a sign of underdevelopment. Where there is a full and adequate review for errors of fact and law there is seldom need to challenge governmental action for incompetence or abuse of discretion. French law on *détournement de pouvoir* is dying,³ and that of the United States is moribund. Since there is one thing of which no one would accuse the international judicial process—that is of being developed—perhaps the content of abuse of discretion in English administrative law may provide the content of international abuse of rights. Professor de Smith⁴ lists six grounds upon which a governmental body will be held to have abused its discretion: acting under another’s dictation, acting under an over-riding rule of policy, acting in bad faith, acting for an improper purpose, taking account of irrelevant factors or failing to take account of relevant ones, and acting unreasonably. The first two are rather specialized and do not fit into any general picture, although both appear in international jurisprudence where appropriate.⁵ All of them relate to the reasons

¹ ‘General Course on Public International Law’, *Recueil des cours*, 106 (1962), p. 1, at p. 174

² *I.C.J. Reports*, 1948, p. 57, at p. 75.

³ J. M. Auby and R. Drago, *Traité de contentieux administratif* (1962 and supp. 1970), para. 1198.

⁴ *Judicial Review of Administrative Action* (2nd ed., 1968), p. 271.

⁵ *Brown’s case*, *R.I.A.A.*, 1923, vol. 6, p. 120 (*U.S. v. British Arbitral Tribunal*) and *Pouros v. Food and Agriculture Organization*, Judgment No. 138, *I.L.O. Official Bulletin*, 53 (1969), p. 150 respectively.

for a decision-maker's reaching a particular conclusion and assume that the conclusion reached is *intra vires*. That is, they are grounds for *détournement de pouvoir*.

Does the practice of international tribunals follow this municipal situation? It seems to be accepted that the International Court of Justice will intervene against abuses of discretion by international organizations, though not those by the General Assembly or the Security Council which can be reviewed only for incompetence.¹ This does not mean that actions of States members of the United Nations acting in their capacity as members cannot be subjected to review for abuse of discretion. Thus, in *Certain Expenses* (Advisory Opinion)² the Court excluded from its consideration any issues but those relating to whether the resolutions were ones which could legitimately be passed, while in *Conditions of Admission of a State to the United Nations* (Advisory Opinion)³ the question canvassed was whether the reason which actuated a State in voting on membership was a legitimate one or not. However, a similar review of State actions is not obviously permissible. This is because of two factors: first, the use of the phrase 'abuse of right' and, secondly, uncertainty as to what form application of the principle will take. The first factor is eliminated by avoiding the word 'right' with its immediate association with Hohfeldian 'rights' and the substitution of 'discretion' which more accurately describes the real nature of the State powers concerned. The second factor is eliminated by reference to municipal administrative law. If the English classification is used as a framework a developed practice in international litigation emerges at once. The analogy supplies the content. The 'abuse of right' which is prohibited emerges not as an international tort,⁴ but as an omnibus term to describe certain ways of exercising a power which are legally reprehensible.

This article accordingly uses the English administrative law classification as a framework and as an indication of what to look for in international adjudication. It first examines certain areas where there is no review for abuse of right, showing in the process the background theory governing the extent of review. Then it discusses the administrative law categories in turn. Finally, it uses the *South-West Africa* cases to draw the categories together in a single factual context.

DEGREES OF CONTROL IN ABUSE OF RIGHT

Every discretionary power, no matter how restricted, contains a degree of margin of appreciation in the person possessing the power. Every

¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (Advisory Opinion), *I.C.J. Reports*, 1971, p. 16.

² *Ibid.*, 1962, p. 151.

³ *Ibid.*, 1948, p. 59.

⁴ *Barcelona Traction, Light and Power Co. Ltd.* (Second Phase), *ibid.*, 1970, p. 3, at p. 324.

discretionary power, no matter how wide, 'doit être exercé en accord avec les devoirs du sujet considéré et ne doit jamais être arbitraire'.¹ There may, however, be powers—even narrow ones—which are totally unreviewable for abuse, not as a matter of law, but because there is no body with practical power to review or because there is no person with *jus standi* to bring an application for review.² In addition, 'les devoirs du sujet' may be so vague that a Court cannot judge whether the power has been exercised in accordance with them. Between these extremes may be found many different degrees of control. English administrative law jurisprudence shows a rough hierarchy from minimum to maximum review: bad faith, improper purpose, relevant and irrelevant factors, and unreasonableness. The cases show certain factors which bear upon the degree of review which the courts will be willing to undertake in a given case. The operation of these factors may be seen by considering three situations in international law.

Plenary governmental power

Power of this nature is power to act in such a way as is thought to be in the interest of the relevant community. The appropriate international attitude is best expressed in the *Lighthouses* case.³ In that case the Permanent Court was concerned, *inter alia*, with the question whether the approval of a decree law given by the Ottoman Parliament did or did not comply with the requirement in Ottoman constitutional law that such a law be 'expedient'. The Court said:⁴

... any grant of legislative powers generally implies the grant of a discretionary right to judge how far their exercise may be necessary or urgent; ... It is a question of appreciating political considerations and conditions of fact, a task which the Government, as the body possessing the requisite knowledge of the political situation, is alone qualified to undertake. It follows from the foregoing that the Ottoman Government, in the first instance, and, subsequently, the Turkish Parliament, were alone qualified to decide whether a given decree law should, or should not, be issued. The Court is, therefore, not called upon to consider whether the Decree Law [in question] ... complied with the conditions rendering its issue expedient according to the terms of the Ottoman Constitution.

The Court went on to say that even if it could look at the question of expediency, it could do no more than see whether the subject-matter was an unusual one to be dealt with by decree law having regard to past practice.

This is a straightforward application of principles of justiciability and arrives at a result similar to that found in municipal cases on the grant of

¹ R. L. Bindschedler, 'La delimitation des compétences des Nations Unies', *Recueil des cours* (1963), vol. 108, p. 307, at p. 315.

² See *Rights of Minorities in Upper Silesia (Minority Schools)*, P.C.I.J., 1928, Ser. A, No. 15.

³ *Ibid.*, 1934, Ser. A/B, No. 62.

⁴ *Ibid.*, at p. 22.

plenary legislative power to a governmental officer.¹ The general legislative power, unrestricted by international obligations, is too great to be reviewed. Its appearance is similar to that of domestic jurisdiction in its narrowest sense, that is, to those matters '[qui] comprennent tout d'abord celles dont le droit des gens abandonne le règlement à la compétence exclusive des États'.² The situation is the same in areas of domestic jurisdiction where a treaty applies but only with respect to certain aspects.³ Such areas of State action as are left unregulated in these ways will tend to be those which are highly political and important to a State's interests. Courts tend to 'sit out' such disputes, even municipally.⁴

State espousal of nationals' claims

In the exercise of its discretion [a State] . . . may espouse a claim or decline to do so. It may press a claim before this Commission or not as it sees fit. . . . In exercising such control, it is governed not only by the interest of the particular claimant but by the larger interests of the whole people of the nation, and must exercise an untrammelled discretion in determining when and how a claim will be presented and pressed, or withdrawn or compromised, and the private owner will be bound by the action taken. But the private nature of the claim inheres in it and is not lost or destroyed so as to make it the property of the nation, although it becomes a national claim in the sense that it is subject to the absolute control of the nation espousing it.⁵

This does not appear at first sight to be a case of a *legally* unreviewable discretion. Normally there is no person who has standing to complain internationally about his State's handling of his claim.⁶ Certainly, an individual has no State to which he can appeal and, for a corporation, the *Barcelona Traction* decision⁷ provides a remedy only where the corporation has become defunct and so notionally ceased to be a national of the State concerned.⁸

The reality behind this is the combination of the existence of a rule of procedural law and the absence of a rule of substantive law. The procedural rule is that dual nationality does not give rise to parallel claims to espouse a person's cause of action. Either one of the States will be selected as the one with power to espouse the dual national's claim⁹ or the rule which prohibits one State from bringing a claim against the other State will be

¹ e.g., *Reference, Re Chemicals Regulations*, [1943] S.C.R. 1.

² R. L. Bindschedler, loc. cit. (above, p. 326 n. 1), at p. 393.

³ See Sir Humphrey Waldock, loc. cit. (above, p. 324 n. 1), p. 184.

⁴ See L. Henkin, 'Vietnam in the Courts of the United States: "Political Questions"', *American Journal of International Law*, 63 (1969), p. 284.

⁵ *Parker v. United Mexican States (U.S. v. Mexican General Claims Commission)*, R.I.A.A., 1926, vol. 35, p. 37.

⁶ *Barcelona Traction, Light and Power Co. Ltd. (Second Phase)*, I.C.J. Reports, 1970, at p. 44 (the Court) and p. 77 (Judge Fitzmaurice).

⁷ Full reference to the case as a whole in the preceding note.

⁸ *Delagoa Bay Railway Company* (1897), 2 I.A. 1865.

⁹ See *Canevaro's case*, R.I.A.A., 1912, vol. 11, p. 397, and *Mergé's case*, ibid., 1955, vol. 14, p. 236 (*U.S. v. Italian Conciliation Commission*) for two solutions.

applied.¹ There is a total absence of substantive law on the subject. Indeed, international tribunals have been careful to keep the law away from this area. The reason for this lies in the general theory of State litigation. Only States have international standing; for a State to have standing it must have sufficient interest in the matter; the injury is to a person who is a member of the State; such an injury affects the body politic in some way; such an injury *is itself* an injury to the State; that is sufficient interest. So long as the first step of this chain is accepted there can be no limit on this State power. The power is not a derived one but an inherent one. It has no object but the good of the State itself. There are no matters which are irrelevant to the State's decision how to deal with a national's claim. There are no reasons which would be legally improper. There can be no review for abuse of right.

Self-judging reservations to the International Court's compulsory jurisdiction

The prototype of such clauses is that of the United States of America which provides that 'this declaration shall not apply to . . . (b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America'. In 1970 only five States retained this type of clause.² Of these Malawi (1966) and the Sudan (1957) use the above formulation, while Liberia (1952) speaks of disputes which the State 'considers' to be domestic, and Mexico uses the phrase 'in the opinion of' Mexico.

The validity of the reservation and the effect which its invalidity may have upon a State's acceptance of the Court's compulsory jurisdiction does not concern us here. The issue is whether invocation of the reservation is susceptible of any degree of judicial review.

Only Judges Read and Basdevant in *Certain Norwegian Loans* case³ have accepted that the Court has any power of review. Judge Read's analysis took its origin from the word 'understanding' which appeared in the French reservation under consideration. Before there could be an understanding, he said, it must (a) be reasonably possible to reach an understanding that the matter was within domestic jurisdiction, and (b) have been considered to be within domestic jurisdiction in good faith.⁴ The first element relates to competence and the second to abuse of right. Judge Basdevant went no further than to state that Norway's invocation of the reservation could be

¹ *Salem's case*, *ibid.*, 1932, vol. 2, p. 1163; *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion), *I.C.J. Reports*, 1949, p. 174, at p. 186.

² *I.C.J. Yearbook 1970-71* (1971). D. P. O'Connell, *International Law* (2nd ed., 1970), vol. 2, pp. 1082-3 is in error. He erroneously places Sudan in the list of States with objective clauses, states that Pakistan has a subjective one (it was amended in 1960), and includes South Africa in the list though that State withdrew from the optional clause in 1967.

³ *I.C.J. Reports*, 1957, p. 9.

⁴ *Ibid.*, at p. 94.

reviewed for abuse of right,¹ which is merely what Norway, which was reluctant to use the reservation in the first place, had already conceded.² In the course of argument, Norway had illustrated its understanding of abuse of right in this area by reference to the sort of case where the subject-matter was manifestly not within domestic jurisdiction: this is simply Judge Read's first element—*excès de pouvoir*.

In his characteristically scholarly opinion, Judge Lauterpacht analysed the scope for reviewing a State's invocation of the reservation. He gave four reasons for rejecting the possibility of judicial review:³ the absolute way in which the reservation was formulated; the unjudicial nature of the inquiry; the offensive character of an opinion that a State had acted unreasonably or in bad faith;⁴ and the character of domestic jurisdiction as 'elastic, indefinable, and potentially all-comprehensive'. In dealing with the fourth reason he compared a reservation of domestic jurisdiction with one of 'matters arising in the course of hostilities' which he saw as a more precise concept. This lack of precision was increased in its effect by the phrase 'essentially within domestic jurisdiction' rather than 'solely' or 'exclusively' within domestic jurisdiction.⁵ He said of his second reason:

I find it juridically repugnant to acquiesce in the suggestion that in deciding whether a matter is essentially within the domestic jurisdiction of a State the Court must be guided not by the substance of the issue involved in a particular case but by a presumption—by a leaning—in favour of the rightfulness of the determination made by the Government responsible for the automatic reservation. Any such suggestion conveys a maxim of policy, not of law.

Above all, he was impressed by the apparent intention of the reserving State to exclude review—an opinion borne out by the *Aerial Incident* case between Bulgaria and the United States where the latter withdrew its argument on reviewability in the light of its own invocation of the automatic reservation in the *Interhandel* case.⁶

The logical core of these reasons, and the pivot of judicial review in this context, is the word 'essentially'. Had the reservation referred to matters 'solely' within domestic jurisdiction, then judicial review would have been readily available—the subject-matter would not be within the reservation

¹ *Ibid.*, at p. 73.

² *I.C.J. Pleadings*, vol. 1, at p. 131.

³ *Interhandel* case (Preliminary Objections), *I.C.J. Reports*, 1959, p. 6, at pp. 112–13.

⁴ This does not seem to square with his attitude expressed in *Voting Procedure on Questions Relating to Reports and Petitions Concerning South West Africa* (Advisory Opinion), *I.C.J.*, 1955, p. 67. See G. G. Fitzmaurice, 'Hersch Lauterpacht—the Scholar as Judge', this *Year Book*, 37 (1961), p. 1, at p. 36, and S. Rosenne, 'Sir Hersch Lauterpacht's Concept of the Task of the International Judge', *American Journal of International Law*, 55 (1961), p. 825, at pp. 831–2.

⁵ *Certain Norwegian Loans*, *I.C.J.*, 1957, p. 9, at p. 42. Cf. Judge Krylov in *Interpretation of Peace Treaties* (Advisory Opinion), *ibid.*, 1950, p. 65, at p. 112, and L. Gross, 'Bulgaria Invokes the Connally Amendment', *American Journal of International Law*, 56 (1962), p. 357, at p. 378.

⁶ See L. Gross, *ibid.*, *passim*.

where there was any rule of international law applicable.¹ 'Essentially', as a matter of degree, changed that. How much is 'essentially'? How is it to be judged? Who is to judge it?

However, judicial review is never eliminated by posing an issue of degree. The subjective phrasing of the reservation indicates no more than that the decision at first instance at least is to be made by the State, though the reserving State no doubt intended more. In this, the International Court is placed in the same position as a municipal court reviewing a ministerial decision that a factual situation does or does not come within a statutory description. The decision is reviewable where the relationship of facts and law is clearly other than that claimed by a minister, or a State, as the case may be. An international tribunal may approach the question with greater restraint than a municipal court, but the analogy remains. Secondly, essentiality indicates substantiality. In general the invocation may be regarded as unlawful where international law regulates every aspect of every issue in the case or where the matters not regulated are few or minor or peripheral. Such an evaluation is not juridically difficult, let alone improper. It is an inquiry as to competence (*excès de pouvoir*)—the first half of Judge Read's review.

Finally, the correct approach may be ascertained also by considering why Judge Lauterpacht thought that a self-judging reservation as to hostilities would be reviewable.² Two differences between the two reservations appear. First, an hostilities reservation involves no basic issue which is a matter of degree. Secondly, 'hostilities' may be defined precisely, though there would be dispute as to any particular definition. But these affect only the scope of review and are not in fact decisive of the existence of review. Given that the Court may legitimately exercise powers of judicial review—and Judge Lauterpacht's second reason denies this—both differences are of degree rather than of kind.

On the basis of this theoretical structure, it is possible to outline the logical scope for reviewing an invocation of a self-judging reservation. In the first place, the International Court could overrule such an invocation where it was only a few minor or peripheral issues in the dispute that were not regulated by international law. In such circumstances the invoking State would be acting in *excès de pouvoir*. But there is probably no room for review upon grounds of abuse of right. If a State declares that it is acting for one reason when in fact it is acting for another, there will be an abuse of right only if the undisclosed reason is a legally improper one, for otherwise the 'fraud' is legally irrelevant. The crucial question is, therefore:

¹ *Tunis and Morocco Decrees on the Nationality of British Subjects* (Advisory Opinion), *P.C.I.J.*, 1923, Ser. B, No. 4.

² Cf. *Conditions of Admission of a State to the United Nations* (Advisory Opinion), *I.C.J. Reports*, 1948, p. 57, at p. 65.

what reasons would be improper? Obviously, the avoidance of litigation on the dispute is a proper reason, as would be the reason that the dispute related to the State's vital interests. If one assumes that invocation as part of a 'deal' with a third State would be improper, this must be because invocation for reasons unrelated to the dispute concerned would be improper.¹ Such a proposition is at least doubtful, but it—or some other proposition regarding certain reasons as irrelevant—is a necessary basis for review on grounds of abuse of right. In the writer's view it cannot be maintained that a State is restricted as to the reasons which prompt it to raise a legally relevant defence—either to the merits or to the Court's jurisdiction. That being so, neither bad faith nor any other ground of abuse of right is available to overrule a State's invocation of its self-judging reservation. Only the review for *excès de pouvoir* remains.

Conclusion

Thus it may be seen that actions in each of these three areas of law are free from review for abuse of right. They have in common the characteristic of leaving the State free to decide *why* it will act or not act. There is nothing in the context or conditions of the power which makes any reason or factor necessarily relevant or irrelevant, and therefore there *can* be no review.

EVIDENCE OF ABUSE OF RIGHT

Bad faith, improper purpose, taking account of irrelevant factors, and unreasonableness are all errors in the mind of the decision-maker.

Problems of proof in this area revolve around causality. That a person is tempted to act in bad faith or otherwise abuse his rights does not invalidate the action taken. The action is invalid only if the abuse was integral to the action taken and led to it in some way. The *reasons* for the action must be bad. In each of the grounds of abuse of right the impermissible reason operates in a different way. The ways are related but are not identical; they cannot all be reduced to that of bad faith.²

The necessary first step is to ascertain the decision-maker's reasons. He may actually state them, or, alternatively, his failure to state them may be an abuse of right.³ Where the reasons are stated, a court will usually restrict itself to them.⁴ Stated reasons which are defective are decisive; the decision-maker cannot later claim that they were not his reasons at all.

¹ For the context of these see below, pp. 333–42.

² This was the essence of South Africa's argument in the *South West Africa* cases, *I.C.J. Reports*, 1962, p. 319, and *ibid.*, 1966, p. 4.

³ *Robinson v. United Nations*, (1952) Judgment No. 15; *McIntire v. Food and Agriculture Organization*, Judgment No. 13, *I.L.O. Official Bulletin*, 37 (1954), p. 273, at p. 276.

⁴ e.g., *Conditions of Admission of a State to the United Nations* (Advisory Opinion), *I.C.J. Reports*, 1948, p. 57.

Where the reasons are not stated they must be inferred from the surrounding facts. Three cases provide good illustrations of the ways in which such 'implied' abuse of right may be established. The first is the *Electricity Company of Sofia and Bulgaria* (Preliminary Objection).¹ The issue in that case was whether a denounced convention for the peaceful settlement of disputes could be invoked to bring the case before the Permanent Court. It was argued, *inter alia*, that Bulgaria had abused its rights in denouncing the treaty at the moment it did. Judge Anzilotti's dissenting opinion dealt with this. There was no evidence of an *ex facie* nature—there had been no announcement that the denunciation was made to avoid litigating the dispute before the Court. Abuse of right could be found only by deduction from the date and the background. Judge Anzilotti relied upon the maxim *qui iure suo utitur neminem laedit*, held that there was no abuse of right, and continued:²

The situation might be somewhat different if the Bulgarian Government . . . had chosen the particular moment at which it had been informed of the Belgian Government's intention to apply to the Court. But that is not the case.

The test at which Judge Anzilotti points is: were the circumstances such that no reasonable State would have renounced the treaty at that moment if it had not had as one of its objects the avoidance of litigating the dispute in question? He used this very approach in ascertaining whether the customs union proposed between Austria and Germany was calculated to alienate Austria's independence.³

This process of inferring an abuse of right is seen also in the rather extreme case of *Smith*.⁴ Smith's land had been compulsorily acquired by the Cuban government. It was alleged that the government had abused its rights, and this claim was upheld by the arbitral tribunal. The day after a municipal court had issued the 'preliminary' order, 150 men arrived on the property and tore down all the buildings. The authorities promptly handed the land to a local who was on good terms with them for him to use as an amusement park for his own profit. Arbitrator Hale laconically remarked that the facts 'do not present the features of an orderly attempt by officers of the law to carry out a formal order of condemnation'.⁵

*Chuinard v. European Organization for Nuclear Research*⁶ illustrates both the finding of the reasons and the examination of whether they caused the action taken. Chuinard was a satisfactory worker but he could not get on with his superiors or subordinates. Over a period parts of his job were

¹ *P.C.I.J.*, 1939, Ser. A/B, No. 77.

² *Ibid.*, at p. 38.

³ *Customs Regime between Germany and Austria* (Advisory Opinion), *P.C.I.J.*, 1931, Ser. A/B, No. 41.

⁴ *R.I.A.A.*, 1929, vol. 2, p. 913.

⁵ *Ibid.*, at p. 917.

⁶ Judgment No. 139, *I.L.O. Official Bulletin*, 53 (1969), p. 153.

allocated to other employees and finally his post was suppressed. He was offered an alternative though lower position which he refused and was then dismissed. The Tribunal first defined the objects of the power to suppress posts—the permanent reduction of staff and expenses. It pointed out that a post could not be suppressed as a way of dismissing an employee, though the fact that the holder of the suppressed post was unsatisfactory did not automatically render the suppression bad. On the facts it was plain that there had been a permanent reduction of staff, but the gradual taking away of jobs from Chuinard and his constant disputes with others showed a pattern of attempted dismissal. The suppression would not have taken place had the Director not desired to dismiss Chuinard. But was this abuse a causal factor in Chuinard's dismissal? Here the Tribunal found for the Organization. The alternative post offered was an appropriate one which a reasonable employee would have accepted. The chain of causation was broken and dismissal could not be seen as a consequence of the suppression which was an abuse of right.

The natural reluctance of international tribunals to find that a State has acted unreasonably or in bad faith led one tribunal to see this implied abuse of right as the only appropriate inquiry. The object is to find whether the facts indicate a defective reason without attempting to find that the State had that reason actually in mind. Thus, the Tribunal in the *Martini* case said:¹

Le Tribunal n'est pas en mesure de se former une opinion sur les motifs qui peuvent avoir inspiré les juges vénézuéliens à l'époque de l'affaire Martini. Si la sentence de la Cour Vénézuélienne est fondée en droit, les motifs psychologiques des juges ne jouent aucun rôle. D'autre part, la défectuosité de la sentence peut être telle qu'il y a lieu de supposer la mauvaise foi des juges, mais également dans ce cas c'est le caractère objectif de la sentence qui est décisif.

Perhaps Judge Lauterpacht's concern not to offend States by holding them to have acted unreasonably stemmed from a belief that the defective reason had to be a real psychological one.² It is not so invidious to say that a State has abused its rights where the tribunal is concerned only with the objective correlation of power and effect.

BAD FAITH

A State or person acts in bad faith where it abuses its rights—by pursuing an improper purpose, taking account of an irrelevant factor, or acting unreasonably—and does so knowing that it is abusing its rights. It is this last factor which makes bad faith what it is and which leads to the judicial

¹ *R.I.A.A.*, 1930, vol. 2, p. 975, at p. 987.

² *Interhandel* case (Preliminary Objections), *I.C.J. Reports*, 1959, pp. 111–13.

reluctance to find that a State or person has so acted. Internationally, good faith is presumed and a State is entitled to rely on the word of another State.¹ Without such a presumption, international intercourse could not continue. The essence of bad faith, then, is the discordance between stated reason and actual reason.² It derives from the principle that one cannot be allowed to say one thing at one moment and another at the next,³ and from the narrower principle that the law can allow no man to 'invoke one reason for exercising his powers when in reality his action is based on another'.⁴

Denial of justice and bad faith

If a municipal court acts in bad faith then there is a denial of justice for international legal purposes. But there is denial of justice also where the court has made a gross error of municipal law. It has often been suggested that this aspect of denial of justice may be summed up by 'bad faith' or, as Presiding Commissioner van Vollenhoven said in *Chattin v. United Mexican States*:⁵

Acts of the *judiciary* . . . are not considered insufficient [in international law] unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiassed man.

But one cannot say that bad faith lies at the heart of this branch of denial of justice unless it is understood to mean bad faith inferred from the circumstances. The applicable test found in the cases may be summed up thus: rendering a decision which no reasonable judge, properly instructed as to the law, could have rendered. Sir Gerald Fitzmaurice has put it this way:⁶

[Mistake of municipal law does not give rise to an international claim] *provided* that no denial of justice, in the proper acceptation of that term in relation to a judicial decision, is involved—i.e. provided the decision, though *mistaken*, was given honestly and in good faith by a properly constituted and normally competent court. Of course, the nature and degree of the error in question may, on a basis of *res ipsa loquitur*, afford in itself evidence that the court cannot have been acting honestly, or else lacked the standards of competence required of the courts of civilized countries; . . .

But it is neither helpful nor necessary to see this as part of bad faith. The 'reasonable judge' formulation is in itself sufficient.

¹ *Lake Lanoux* case, I.L.R. 24 (1957), p. 101, at p. 126.

² C. Chaumont, 'Cours Général de Droit International Public', *Recueil des cours*, 129 (1970), p. 333, at p. 382.

³ *Ibid.*, at p. 381.

⁴ *McIntire v. Food and Agriculture Organization*, Judgment No. 13, I.L.O. *Official Bulletin*, 37 (1954), p. 273, at p. 276.

⁵ *U.S. v. Mexican General Claims Commission*, R.I.A.A., 1927, vol. 4, p. 282, at pp. 286-7.

⁶ G. G. Fitzmaurice, loc. cit. (above, p. 329 n. 4), at p. 57.

Unratified treaties and bad faith

Article 18 of the Vienna Convention on the Law of Treaties¹ provides:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty: or
- (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided such entry into force is not unduly delayed.

The draft provision (Article 17) approved by the International Law Commission in 1965 differed from the above in its introductory statement which provided that: 'A State is obliged to refrain from acts calculated to frustrate the object of a proposed treaty when . . .' The final Commission draft article (Article 15) substituted 'tending' for 'calculated' in the 1965 version.

In his discussion of the final Commission draft, W. Morvay thought that the article raised a test of bad faith.² The law prior to the treaty was not, however, very clear. What material there is suggests that the law required no more than that a State should refrain from deliberately seeking to subvert the objects of a treaty. This is an obligation to act in good faith. The 1965 draft's use of 'calculated' is very close to this, and shows the influence of Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice who had been previous rapporteurs. The changed wording in the final draft and the Convention move away from any requirement which is one of good faith. Both formulations raise objective tests. The change was proposed in the Commission by some of the foremost international lawyers present (MM. Ago, Bartos, Castreñ, Rosenne, Reuter and Yaseen) and they saw it as a move away from subjectivity and the test of bad faith.³ The final change represented another step away. State action is therefore to be judged by the relationship of fact (the action taken) to law (the object of the treaty) without more. It goes without saying that a deliberate frustration of the treaty is prohibited, but the prohibition is wider than this. It is not limited to bad faith.

*The Tacna-Arica question*⁴

Tacna-Arica was a tract of land within Peru but claimed by Chile. By treaty the two States agreed that Chile should administer it for a period at the end of which there should be a plebiscite to determine whether the inhabitants wished to be Peruvian or Chilean. It was alleged that Chile was

¹ (1969), Cmnd. 4140.

² 'The Obligation of a State not to Frustrate the Object of a Treaty Prior to its Entry into Force', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 27 (1967), p. 451, at p. 461.

³ Ibid., at pp. 456-7.

⁴ *R.I.A.A.*, 1925, vol. 2, p. 921.

seeking to frustrate the plebiscite by forcing Peruvians out of the area and inducing an influx of Chileans. The Tribunal found bad faith in only one respect—the discriminatory conscription of Peruvians into the Chilean armed forces.¹ The Tribunal was overtly concerned with ascertaining the intention of the Chilean officials. It examined both their stated intent (*ex facie* bad faith) and the effect of the conscription decisions made (implied bad faith). On the facts it was apparent that conscription of Peruvian youths was initiated as a matter of course in circumstances which forced Peruvians to leave. An inference of bad faith was made from this. On the issue of artificially stimulated immigration the Tribunal could see no measures inconsistent with 'the legitimate and normal development of the provinces'.² No inference of bad faith was made, but the structure of the opinion on this issue shows that the investigation was to find bad faith.

IMPROPER PURPOSES

What purposes are improper?

In municipal law most powers are granted in terms which indicate their ambit and objective. But where no ambit or objective is indicated then a preliminary question arises in filling this blank. Relatively few powers in international law contain such an express 'purpose'.

The process of deducing the 'purpose' of a State power is well shown in the *Right of Passage over Indian Territory* (Merits) case.³ Having held that Portugal had a right to send civilians over Indian territory between her various colonial enclaves in the West of the Indian sub-continent, and having recognized India's right to regulate that traffic, the International Court had to consider the balance between these conflicting rights. The core of the Portuguese argument is contained in these two quotations:

La question qui se pose n'est pas, en effet, de savoir si la compétence de l'Inde est exclusive, en ce sens qu'elle seule est qualifiée pour l'exercer. La question est de savoir si cette compétence est discrétionnaire ou si elle est soumise à l'obligation de ne pas faire obstacle au transit nécessaire pour que le Portugal puisse exercer effectivement sa souveraineté sur les enclaves.⁴

Droit de passage, oui, mais droit sans immunité. C'est à l'Union indienne, en tant que Puissance souveraine du territoire par lequel s'effectue le passage, qu'il appartient de réglementer et de contrôler celui-ci à tous les points de vue. Une seule chose lui est juridiquement impossible, son obligation vis-à-vis du Portugal s'y opposant: c'est d'interdire le passage ou de l'empêcher dans la pratique, au moyen de cette réglementation et de ce contrôle; car, le faisant, elle viole cette obligation et en encourt la responsabilité.⁵

¹ *R.I.A.A.*, 1925, vol. 2, p. 921, at p. 941.

³ *I.C.J. Reports*, 1960, p. 6.

⁵ *Ibid.*, vol. 4, pp. 294-5 (M. Telles, in argument).

² *Ibid.*, at p. 936.

⁴ *I.C.J. Pleadings*, 1960, vol. 2, p. 409 (Reply).

Only Judge Spender discussed the theoretical aspects of Indian regulation of transit. The other Judges dealt with the facts in a way consistent with Judge Spender's theory that:¹

If India had in fact purported to regulate and control Portugal's right of passage, it would have been relevant to enquire whether the action taken by India was in reality a regulation or control of the right of passage, or was directed to another and different purpose. It would have been relevant to enquire whether it was in fact directed to the right of passage as such so as to render it nugatory.

Judge Spender found on the facts that there was no purported regulation at all. The theory, however, makes the inquiry whether a particular refusal of transit was made for the reason, *inter alia*, that India disliked any right of passage rather than that the particular transit was unnecessary or undesirable given the special facts relating to it.

In the *Right of Passage* case the presence of two conflicting rights made the derivation of some improper purposes necessary. These purposes were deduced from the natures and incidences of the rights involved. Where there is an empowering provision which deals with the power in any detail, this process is short-circuited. The purposes which are improper are derived by the usual rules of Treaty or Statutory Interpretation.²

Proof of an improper purpose

The existence of an improper purpose may appear either *ex facie* (on the 'face' of the action or decision) or impliedly (from the way the action or decision operates). There need be no abuse of right in either word or effect. Of the minority protection provisions in the First World War Peace Treaties, the Permanent Court said: 'There must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law.'³ This approach has been used by the European Commission of Human Rights when ascertaining whether a particular extradition is vitiated by abuse of right. The Commission will interfere⁴

. . . where a person is extradited to a particular country in which, due to the very nature of the régime of that country or to a particular situation in that country, basic human rights, such as are guaranteed by the Convention, might be either grossly violated or entirely suppressed, . . .

Many similar illustrations may be drawn from the jurisprudence of the United Nations and the International Labour Organization Administrative Tribunals.⁵

¹ *Ibid.*, p. 114.

² These two processes in administrative law are illustrated respectively by *Roberts v. Hopwood*, [1925] A.C. 578 (H.L.) and *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 (H.L.).

³ *German Settlers in Territory Ceded to Poland* (Advisory Opinion), P.C.I.J., 1923, Ser. B, No. 6, at p. 24.

⁴ *X. v. Federal Republic of Germany* (Req. No. 1802/62), *Yearbook of the E.C. on Human Rights* (1963), p. 462, at p. 480.

⁵ *Chuinard v. European Organization for Nuclear Research*, Judgment No. 139, I.L.O. Official

The requirement that there be no abuse of right in effect as well as word has not always been adhered to strictly. The case of *Oscar Chinn*¹ is a good example of such a failure. Belgium was required by Treaty to administer the Congo river so as to preserve 'complete commercial equality' among users. The Belgian Government held a majority of the shares in a company which competed with Chinn for transport on the river. When the great depression came, the Belgian Government ordered the reduction of its company's charges to an uneconomical level and promised to reimburse the loss made. Chinn went out of business. The Court held that there had been no violation of the equality provision. It was held that the instruction did not benefit Belgians as such or hinder foreigners as such in its wording. Judge Hurst, in a strong dissent, stated the general principle clearly and correctly:²

... the basis of the British case must be that the measures taken by the Belgian Government were in themselves unlawful, either by reason of the intention with which they were taken, or by reason of the consequences which they were bound to entail and which should have been foreseen by the Belgian Government. In this latter, the element of intention would be immaterial.

In terms of this dissent, the rationale of the majority's position 'would be that the effect was insufficiently convincing and severe to condemn the action by relation back from its effects'. The majority felt, incorrectly, that they were obliged to make a finding close to one of bad faith so that they required a greater clarity of effect before inferring an improper intent.

This emphasis on *ex facie* improper purpose may be present quite correctly in other contexts. The less justiciable is the question whether the power was properly exercised, and the vaguer are the criteria by which the power was to be exercised, the less scope is there for review for more than incompetence and bad faith. This is because the courts become more reluctant to hold that there has been a misuse of competence without some element of bad faith. That reluctance added strength to South African arguments in the *South-West Africa* cases.³ But there is no inherent need to see the object of the inquiry as a finding of intent; where the necessary effect of a law or action is inconsistent with international law in the manner discussed in this section, an abuse of right has been established.⁴

Bulletin, 53 (1969), p. 153. *Duberg v. U.N.E.S.C.O.*, Judgment No. 17, *ibid.*, 38 (1955), p. 251, at p. 254; *Crawford v. United Nations* (1953), Judgment No. 18, para. 7; *Howrani v. United Nations* (1951), Judgment No. 5.

¹ *P.C.I.J.* 1934, Ser. A/B, No. 63.

² *Ibid.*, at p. 54.

³ *I.C.J. Reports*, 1962, p. 319 and *ibid.*, 1966, p. 4.

⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (Advisory Opinion), *ibid.*, 1971, p. 16, at p. 57.

Improper purposes for expropriation

International law makes the vague and ethereal demand of States that they expropriate aliens' property only for 'reasons of public utility'. It would be attractive to derive from that the general proposition that the only proper purpose for expropriation is to benefit the public. Professor O'Connell appears to take this view.¹ He derives it from *Czechoslovakian Posts and Telegraphs Administrator v. Radio Corporation of America*.²

The parties in that case had entered into an agreement whereby R.C.A. was given exclusive rights to telegraph traffic between the United States of America and Czechoslovakia. Czechoslovakia claimed that R.C.A. was breaking the agreement by failing to 'secure the successful and remunerative working of the line' because Czech-bound traffic was very much less than United States bound traffic. The State, therefore, entered into an agreement with another corporation to run a service parallel to that of R.C.A. The case was arbitrated at R.C.A.'s instance. It was held that the contract was a private law one so that it was irrelevant that one of the parties was a State. However, as *obiter dictum*, the tribunal stated the law upon the assumption that it was a public law agreement. If so, then, it was said, Czechoslovakia could only repudiate the agreement if otherwise 'public interests of vital importance would suffer'.³ This does not support the general proposition that any expropriation must be for reasons of 'public interest'. Professor O'Connell goes further, however, and states that the proposition just quoted was given content by the later statement that:⁴

When a public institution enters into an agreement with a private person or a private company, it must be assumed that the institution has intended by this agreement to benefit its citizens. But that this expectation sometimes proves to fail in not giving the country as large a profit as was expected, cannot be considered sufficient reason for releasing that public institution from its obligations as signatory of said agreement.

Both statements deal with public benefit, but the two propositions have nothing else in common. The second was made with reference to an argument that the agreement created a 'company of mutual profit' under the Czech Civil Code because a State, it was argued, is 'exclusively directed by the considerations of commercial advantages for its citizens'.⁴ The quotation set out was inserted by the Tribunal as part of a refutation of that argument.

Administrative law, too, has been faced with the task of restricting powers which are to be exercised for the 'public interest'. They have been unable

¹ D. P. O'Connell, *op. cit.* (above, p. 328 n. 2), p. 778.

² *American Journal of International Law*, 30 (1932), p. 523.

³ *Ibid.*, p. 531.

⁴ *Ibid.*, p. 534.

to prescribe any general limitation of object. Instead, the courts have worked from the other end: it is an abuse of discretion to act for the purpose of lining private pockets¹ or to attack an individual or group of individuals² where this is intended almost to the exclusion of 'public' purposes. These two restrictions are to be found also in international expropriation cases. *Smith*³ exemplifies the former and *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers*⁴ is an apt example of the latter.

This, it is submitted, is the correct approach. The right to expropriate is discretionary. General international law does not confine that power in the way in which a municipal statute might do so. The only possible limit is that spelled out from the general nature of government—that expropriation must be for the public interest. This is too vague to be defined other than negatively. The highest point at which a readily justiciable issue can be stated is that the expropriation must not be for private benefit or be discriminatory to the almost complete exclusion of reasons relating to the needs of the community.

Discrimination

Something rather exceptional must be proved before an action will be held to be wrongfully discriminatory. An action is not wrongful merely because it helps some considerably and acts to the detriment of others. Most State actions are unequal in their operation, and every State or international organization possesses a discretion in assessing whether the action serves the community despite this inequality. Thus, in *El Triunfo* case⁵ the tribunal was willing to find that the expropriation there involved was discriminatory because (a) the only property taken was that of a United States national and (b) relations with the United States at the time indicated that that property had been taken *because* it belonged to a person of that nationality. This is a high standard of proof. It may be that the majority in *Oscar Chinn*⁶ took the view they did because the benefit of keeping at least one river transport service in operation was sufficient to lay on the credit side against the discriminatory effect of the subsidy.

In the jurisprudence of the European Commission and Court of Human Rights there is no discrimination where the benefiting of some and harming of others is explicable to some extent by a proper reason. In *Church of Scientology v. United Kingdom* (Req. No. 3798/68)⁷ the Commission noted that:

¹ e.g. *United Buildings Corp. Ltd. v. Vancouver Corp.*, [1915] A.C. 345 (J.C.) at pp. 353-4.

² The French case of *Ribotti* 1956 C.E. 609 (political and religious discrimination) provides a very apt example here.

³ *R.I.A.A.*, 1929, vol. 2, p. 913.

⁴ *Ibid.*, 1926, vol. 2, p. 777, at p. 794.

⁵ [1902] U.S. For. Rel. 838.

⁶ *P.C.I.J.*, 1934, Ser. A/B, No. 63.

⁷ *Yearbook of the E.C. on Human Rights* (1969), p. 306, at p. 322.

. . . in deciding whether to recognise an institution as an educational establishment, [the State] is entitled to have regard to certain minimum educational standards, . . . therefore, any governmental measures which are taken to differentiate between institutions on such a basis do not constitute discrimination . . .

The point is clearer in the Court's decision in *Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (Merits).¹ Complete equality as a Conventional requirement was rejected at the outset:²

The competent national authorities are frequently confronted with situations and problems which, on account of differences inherent therein, call for different legal solutions; moreover, certain legal inequalities tend only to correct factual inequalities.

The key was stated to be the existence of an 'objective and reasonable justification' for the distinction:³

The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: . . . [the Convention] is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.

Only one of the measures attacked was held to be discriminatory, and that because it was 'not imposed in the interest of schools, for administrative and financial reasons: it proceeds solely . . . from considerations relating to language'.⁴ This is a classical exposition of the role of review for improper purpose in international adjudication.

Conclusions

Does international law contain a general prohibition wider than that of discrimination or private gain? Dr. A. C. Kiss, in his most thorough investigation of abuse of right,⁵ arrived at three headings of abuses of right. First, use of a State power which interferes with another State's use of a power which it possesses;⁶ secondly, use of a power for a reason which was not one for which the power was conferred ('un but autre que celui en vue duquel les compétences étaient attribuées aux autorités étatiques');⁷ thirdly, use of a power in an unjustifiable ('injustifié et injustifiable') or arbitrary ('l'exercice arbitraire des pouvoirs discrétionnaires') manner.⁸

The first heading represents the ultimate basis of abuse of right.⁹ In practice it appears as bad faith. The third heading emerges from general international law. Both 'injustifiable' and 'arbitraire' point to discrimination and the absence of connection with matters which should be relevant to a

¹ Ibid. (1968), p. 832.

² Ibid., p. 864.

³ Ibid., p. 866.

⁴ Ibid., p. 942.

⁵ *L'Abus de droit en droit international* (1953).

⁶ Ibid., p. 184.

⁷ Ibid., p. 186.

⁸ Ibid., p. 187.

⁹ See the first section of this article.

State's decision upon an international matter, for instance, the private gain object. It is the second heading which reaches furthest and possesses the greatest scope for growth, but it has no general field of operation in State action. For it to operate there must be a conferred power set out with some measure of precision. Few State powers are conferred. Even the powers of international organizations are expressed with too great a generality for review for improper purpose to bite. At a lower level there is such scope, and the jurisprudence of the United Nations and the International Labour Organization Administrative Tribunals show considerable development in this area. There is, however, little reason to expect State powers or those of international organizations to follow suit.

TAKING ACCOUNT OF IRRELEVANT CONSIDERATIONS AND FAILING TO TAKE ACCOUNT OF RELEVANT ONES

English and Commonwealth courts have always found this ground of abuse of discretion more manageable than that of improper purposes. It presents none of the justiciability-oriented difficulties found in the case of improper purpose. Here the empowering provision contains a list of the matters which must be considered in arriving at a decision. This leaves the courts with the relatively easy task of ascertaining whether those reasons have been considered or omitted and whether any other reasons have been drawn upon. If one of the listed matters has not been considered, there has been an abuse of discretion (abuse of right). If a matter other than those listed has been considered then (a) if the list is exclusive, there has been an abuse of discretion, but (b) if the list is not exclusive, the State decision-maker has a discretion as to the other matters he will consider and there is an abuse of discretion only if the matter is unauthorized in the sense of being an 'improper purpose'. When one speaks of a decision-maker's taking account of an irrelevant consideration one means that the decision-maker has considered a matter which bears such a relationship to the listed ones that a reasonable decision-maker could not have interpreted a listed matter to include it. When one speaks of a decision-maker's failing to take account of a relevant consideration one does not mean that the decision-maker misconstrued the list so that he looked at the wrong thing, but that he did not direct his mind to the listed matter at all.¹ That, at any rate, is the correct analysis of the administrative law cases.

International adjudication contains few examples of this ground, but then the enumeration of matters to be considered by a State organ is rare. One example of this ground of abuse of right is the *Martini* case.² There

¹ See, especially, *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147 (H.L.) at 174 (Lord Reid), 201 (Lord Pearce), and 214 (Lord Wilberforce).

² *R.I.A.A.*, 1930, vol. 2, p. 975, at p. 995.

the tribunal held that the Venezuelan court had made a reviewable error when it took account of a head of damages which was not one listed in the arbitral award that gave rise to the municipal court's jurisdiction. Further, the administrative tribunals use it in respect of the Secretary-General's powers over employment.¹ However, there is one case where this ground of review was the appropriate one, was the one used, and was used in a manner identical to the municipal law approach.

In *Conditions of Admission of a State to the United Nations* (Advisory Opinion)² the International Court was called upon to decide whether the conditions listed in Article 4 (1) of the Charter of the United Nations were exhaustive and whether a certain matter was a relevant one for States to take into account. Article 4 (1) provided that:

Membership of the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

The allegedly improper matter was that if State *A* would vote for the admission of State *B*'s protégé, *X*, then State *B* would vote for State *A*'s protégé, *Y*.

Article 4 (1) enumerated four reasons to which all voters had to advert. Analysis with respect to them was that of relevant and irrelevant considerations. No Judge dissented from this proposition. The issues were whether there was a residual discretion into which the matter in issue could fall and, if not, whether the enumerated matters could encompass the one in issue.

The majority held that the enumeration was exhaustive. Passing on to consider whether the matter came within those enumerated, the Court noted:³

Article 4 does not forbid the taking into account of any factor which it is possible reasonably and in good faith to connect with the conditions laid down in that Article. The taking into account of such factors is implied in the very wide and very elastic nature of the prescribed conditions, . . .

This indicated the view that a considerable margin of appreciation had been left to the voting States. The allegedly irrelevant matter was then considered and held to be bad:⁴

. . . [it] clearly constitutes a new condition, since it is entirely unconnected with those prescribed in Article 4. It is also in an entirely different category . . . since it makes admission dependent . . . on an extraneous consideration concerning States other than the applicant State.

This makes two points. First, that the matter was incapable of being subsumed to one of those stated—it was an irrelevant consideration. Secondly,

¹ *Julhiard v. United Nations* (1955) Judgment No. 62; *Giuffrida Food and Agriculture Organization* (1960) Judgment No. 47, *I.L.O. Official Bulletin*, 43 (1960), p. 479.

² *I.C.J. Reports*, 1948, p. 57.

³ *Ibid.*, p. 63.

⁴ *Ibid.*, p. 65.

it implies that the matter was foreign to the general tenor and aim of Article 4 (1)—it was an improper purpose.

The dissentients held that there was a residual discretion in States to consider matters other than those enumerated. Their approach was therefore one of improper purposes. First, they looked for the aims and objects of the Article but could find only a reference to the aims and objects of the Organization itself. Hence, they differed from the majority and were led to the conclusion that:¹

In the exercise of this power the Member is legally bound to have regard to the principle of good faith, to give effect to the Purposes and Principles of the United Nations and to act in such a manner as not to involve any breach of the Charter.

This is a correct conclusion given their proposition that the aim and object of the Article could be found only in the aim and object of the Organization. But the control is in fact no control, for the Organization's aims and objects are so vague and general that precise evaluation of any given matter is impossible.

UNREASONABLENESS

There is a real danger of losing oneself among the shifting meanings of unreasonableness. If to act unreasonably means to act in a way in which a reasonable man would not act, then virtually every ground of judicial review is encompassed in 'unreasonableness'. Administrative law cases show four distinct meanings of unreasonableness: (a) lack of a sufficient connection between a factual situation and a legal proposition,² (b) an absurd, irrational, or arbitrary action,³ (c) an action which is thoroughly bad and should certainly not have been done,⁴ (d) an action which seriously violates the basic principles behind a body.⁵ It is therefore essential to isolate the usage of the word in each case.

A study of administrative law shows that most of the times an action is described as 'unreasonable' the judge is using the word to describe an error which comes under another ground for review. Perhaps the most frequent use of 'unreasonableness' is to describe the lack of connection between a factual situation and a legal proposition. This is certainly true of its use in international adjudication. For instance, in *Lawless v. Ireland* (Merits)⁶ the test of 'reasonableness' (reasonable connection) was used to determine whether a particular emergency was capable of being regarded as one

¹ *I.C.J. Reports*, 1948, p. 92, *per* Judges Basdevant, Winiarski, McNair and Read.

² e.g. *Edwards v. Bairstow*, [1956] A.C. 14 (H.L.).

³ e.g. *Kruse v. Johnson*, [1898] 2 Q.B. 91 (D.C.).

⁴ e.g. *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223 (C.A.).

⁵ e.g. *Roberts v. Hopwood*, [1925] A.C. 578 (H.L.).

⁶ *Yearbook of the E.C. on Human Rights* (1961), p. 438, at pp. 474-80 (the Court).

threatening the life of the State. The use in *Hochbaum*¹ was similar. Again, in *Interhandel* (Preliminary Objections)² Judge Lauterpacht,³ and in *Application of the Convention of 1902 Governing the Guardianship of Infants*⁴ the Dutch argument,⁵ used reasonableness in this way to determine whether a matter came within a treaty description. Finally, the European Court of Human Rights has adopted reasonableness in this sense as the appropriate description of the scope of their inquiry into the propriety of pre-trial detention.⁶

In what sense is unreasonableness a unique concept? Two cases from administrative law provide two illustrations. In *Kruse v. Johnson*⁷ Lord Russell C.J. said bylaws would be unreasonable if they were:⁸

. . . partial and unequal in their operation as between different classes; if they were manifestly unjust; . . . if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, . . .

The second case is *Roberts v. Hopwood*.⁹ There five Law Lords gave fifteen different reasons for their decision. A synthesis, in so far as one can be drawn from the opinions, is that an action is unreasonable if it lacks logic either by being faulty in its logical processes or by the invalidity of one of its premisses—in the opinion of the judges.

The reluctance of courts to find that a body has acted unreasonably is fully understandable. True unreasonableness is one of the few areas of judicial review where the court must substitute its own ideas of what is right without leaving a margin of appreciation to the decision-maker. True unreasonableness is a residual power of review. It has not appeared in interstate adjudications; it would be surprising to find it used. However, it is to be found in the jurisprudence of the Administrative Tribunals.¹⁰

REVIEW FOR ABUSE OF RIGHT, AND ITS ABUSE: THE SOUTH-WEST AFRICA CASES

These claims¹¹ raised in a very fundamental way the problems of international judicial review of discretionary State action. The way the case was argued and the way in which the Judges dealt with the submissions on the

¹ *Annual Digest* (1933-34), Case No. 134 (Upper Silesian Arbitral Tribunal).

² *I.C.J. Reports*, 1959, p. 6.

³ *Ibid.*, p. 111.

⁴ *Ibid.*, 1958, p. 55.

⁵ *I.C.J. Pleadings* (1958), pp. 101-5 (Reply) and pp. 149-55 (Professor Kisch, in argument).

⁶ See *Wemhoff v. Federal Republic of Germany*, *Yearbook of the E.C. on Human Rights* (1968), p. 796, and *Stögmüller v. Austria*, *ibid.* (1969), p. 364, at p. 394.

⁷ [1898] 2 Q.B. 91 (D.C.).

⁸ *Ibid.*, at pp. 99-100.

⁹ [1925] A.C. 578 (H.L.).

¹⁰ e.g. *Howrani v. United Nations* (1951), Judgment No. 4.

¹¹ (Preliminary Objections), *I.C.J. Reports*, 1962, p. 319; (Second Phase), *ibid.* (1966), p. 4.

merits indicate that neither counsel nor Judges really understood the role which they were required to play.

The facts

It was alleged that South Africa had violated its Mandate to govern South-West Africa by misusing its governmental competence. South Africa had allegedly failed in its obligation to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory under Article 2 (2) of the Mandate. There were other allegations of breach, for instance, in militarizing the territory. While Ethiopia and Liberia commenced by alleging abuse of discretion, a very able (though misconceived) argument by Mr. de Villiers for South Africa drove them back to abandoning this in favour of deducing abuse by the legal fiction that racial discrimination could never be for the well-being of the inhabitants. In the event the Court did not find it necessary to adjudicate upon the argument about abuse of discretion. Few judges did so and only Judge *ad hoc* van Wyk did so in depth.

The issues

Does the International Court of Justice have a power of judicial review? South Africa did not concede this, and the discussion of judicial review arose only as an alternative submission.¹ It was not until South Africa's rejoinder that the argument on this matter was joined in earnest.² It is believed that the power of judicial review is inherent in a court such as the World Court. If there are rules of law limiting the power of a State in any respect then a court to which the parties are subject has power to determine whether those rules have been breached. The *South-West Africa* cases were instances of just this.

The keystone to the question was the wide phrasing of Article 2 (2) of the Mandate, made all the wider by the narrow phrasing of its Articles 3 to 5.³ This had two consequences. First, there was inevitably a wide discretion conferred by Article 2 (2), and this discretion had necessarily to be wider than those under the other provisions. Article 2 (2) contained only one criterion—the requirement that South Africa promote the well-being of the inhabitants to the 'utmost'. It was at one stage of the proceedings argued that without the norm of non-discrimination there could be no review at all.⁴ This would have been an accurate observation only if the criterion did not give rise to anything capable of objective evaluation. This was not so. Article 2 (2) conferred a near-governmental power—a plenary power—but it remained a conferred power and showed on its face a purpose

¹ *I.C.J. Pleadings* (1966), vol. 5, p. 157.

³ *Ibid.*, vol. 8, p. 629.

² *Ibid.*, vol. 9, pp. 491 et seq.

⁴ *Ibid.*, vol. 5, p. 164 (Rejoinder).

for conferral. Therefore, it had to be used positively for that purpose. This distinguishes the power from those which give rise only to negative restrictions.

The judicial opinions

The judges who did discuss abuse of discretion recognized that they were acting as a review authority of sorts. But what sort? Judge Forster, for instance, spoke of the power to review for *détournement de pouvoir*¹ but did not expand on this. Judge *ad hoc* van Wyk mentioned, as grounds for review, all those discussed in this article, though he gave no clear indication that he saw them as separate grounds.² Judge Tanaka first took the position that the only ground was bad faith³ though he subsequently stated that:⁴

If any legal norm exists which is applicable to the exercise of the discretionary power of the Mandatory, then it will present itself as a limitation of this power, and the possible violation of this norm would result in a breach of the Mandate and hence the justiciability of this matter.

This statement was made apropos of the applicants' submission that the norm of non-discrimination imposed a limit upon South Africa's exercise of power but it also implies a thorough-going review for abuse of discretion. Indeed, Judge Tanaka later referred to 'the general rules which prohibit the Mandatory from abusing its power and *mala fides* in performing its obligations'.⁵ Judge Jessup alone developed the obvious analogy of municipal administrative law which was, in fact, given some discussion in the course of the argument.⁶ He rejected South Africa's final submission that all review is in essence based on the finding of bad faith.⁷ He concluded that there was scope for review for improper purposes.⁸ These were the only judges who discussed the place of international judicial review.

South Africa's arguments

South Africa's argument developed as follows. First, it was propounded that State actions are restricted only by positive provisions of international law—*The Lotus*⁹ theorem—so that in order to base the Court's review those positive restrictions had to be found in the Mandate.¹⁰ The only restriction in Article 2 (2) was that South Africa must act for the moral and material well-being of the inhabitants. Finding that there was no more specific direction as to how South Africa was to administer the territory, South Africa concluded that there could be no control over the actual exercise of

¹ *I.C.J. Reports*, 1966, p. 481.

² *Ibid.*, pp. 150–3.

³ *Ibid.*, p. 283.

⁴ *Ibid.*, p. 284.

⁵ *Ibid.*, p. 301.

⁶ *I.C.J. Pleadings* (1966), vol. 2, p. 392 (Counter-Memorial); vol. 8, pp. 158 et seq. (Rejoinder); *ibid.*, pp. 275–6 (Mr. de Villiers, in argument).

⁷ *I.C.J. Reports*, 1966, pp. 434–5.

⁸ *Ibid.*, pp. 435–8.

⁹ *P.C.I.J.*, 1927, Ser. A, No. 10.

¹⁰ *I.C.J. Pleadings* (1966), vol. 5, pp. 157–60 (Rejoinder).

the power to administer.¹ It was deduced from this that the Court could concern itself only with errors of procedure,² competence,³ essential pre-requisites for acting in a particular way,⁴ and bad faith.

South Africa's alternative contention was that, even if the Court could review for improper purposes, the argument necessarily failed. In the first place, it was said, the applicants had made their case in terms of bad faith—that South Africa knew it was doing wrong.⁵ Secondly, in South Africa's view it was extremely unlikely that a State could pursue an improper purpose in relation to Article 2 (2) without doing so knowingly,⁶ that is, without bad faith. All possible grounds for misuse were the same—bad faith. Improper purpose differed from bad faith only in knowledge, and unreasonableness came down to bad faith because the proper test was that the action taken was so bad that it must have been in bad faith.⁷ These propositions were stated repeatedly⁸ and only weakly rebutted.⁹

While Judge *ad hoc* van Wyk agreed that an improper purpose could be either *ex facie* or implied,¹⁰ Mr. de Villiers made the requirement for evidence of implied improper purpose so strict as to negative its existence. First he argued that the Court must look to all the evidence, both that showing *ex facie* improper purpose and that showing implied improper purpose. But, he continued, it was the *ex facie* side—the evidence which showed the decision-maker's subjective intent—which was the heart of the matter. Should there be no evidence of subjective intent, he propounded, then the evidence of implied improper purpose must be overwhelming—such that there remained no room for 'honest difference of opinion'—and to the effect that the decision-maker must have intended to achieve an unauthorized purpose.¹¹ In support of this Mr. de Villiers made use of administrative law material, but took the dicta one step further than was warranted. The courts do not *have* to infer bad faith from the operation of the action and the background facts before holding it to be an abuse of discretion.

The correct analysis

The essential starting-point for discussion of judicial review of the Mandate is Article 2 (2) itself. This Article requires that South Africa's

¹ *I.C.J. Pleadings*, vol. 8, p. 619; Judge *ad hoc* van Wyk, *I.C.J. Reports*, 1966, pp. 150-1.

² *I.C.J. Pleadings* (1966), vol. 8, p. 621; vol. 9, p. 494; Judge *ad hoc* van Wyk, *I.C.J. Reports*, 1966, p. 151.

³ *I.C.J. Pleadings* (1966), vol. 8, p. 621; Judge *ad hoc* van Wyk, *I.C.J. Reports*, 1966, p. 151.

⁴ *I.C.J. Pleadings* (1966), vol. 9, p. 500.

⁵ *I.C.J. Reports*, 1966, pp. 153-4.

⁶ *Ibid.*, p. 152; *I.C.J. Pleadings* (1966), vol. 9, pp. 503-4.

⁷ *Ibid.*, p. 500.

⁸ *Ibid.*, vol. 2, p. 392 (Counter-Memorial); vol. 5, pp. 161 and 171 (Rejoinder); vol. 8, pp. 275 and 621 (Mr. de Villiers, in argument).

⁹ *Ibid.*, pp. 244-5; vol. 9, pp. 38-41.

¹⁰ *I.C.J. Reports*, 1966, p. 152.

¹¹ *I.C.J. Pleadings* (1966), vol. 5, pp. 158-9 and 172 (Rejoinder); vol. 8, pp. 690-2.

power of administration be exercised so as to promote the well-being of the inhabitants of the territory. This sets up a positive criterion of State action, albeit a vague one. Coupled with this is the direction that such promotion be to the 'utmost'. Therefore, there may be situations where South Africa's actions promote well-being but not to the utmost. For instance, if an increasing proportion of African children are being educated then the well-being of the inhabitants is being promoted. But if only ten per cent of the education budget for South-West Africa is being spent upon the education of African children then it could not be said that the well-being of the inhabitants was being promoted to the 'utmost'. This does not involve any allegation of bad faith.

The situation may usefully be compared with that under the self-judging reservations to the compulsory jurisdiction of the International Court. In both cases there is a very vague concept—domestic jurisdiction and well-being—coupled with a requirement which is a matter of degree—essentiality and utmost. The difference is that essentiality is descriptive of an area which is less than total, while the direction to promote well-being to the utmost is a hundred per cent proposition. Before the Court can say that a matter is not essentially within domestic jurisdiction there must be little or no element of domestic jurisdiction. This is not true of promotion to the utmost. Thus, while the self-judging reservation does not leave scope for judicial review for misuse of competence beyond the minimum of good faith, Article 2 (2) does.

The mere fact that the Court in *South-West Africa* was not concerned with an inherent State power but with a conferred power takes the matter beyond the first and third classes of abuse of right found by Dr. Kiss.¹ Hence, reasons which South Africa may use in deciding whether to take a particular action in South-West Africa may be impugned, not for irrelevant considerations (for there is no enumeration), but for improper purposes and unreasonableness. The latter (lack of a valid logical reason for the action) need be considered no further. It did not arise in the cases and is largely self-explanatory. The structure of the Mandate and especially of Article 2 (2) point to two categories of reasons which are outside the Mandate and are therefore improper. These are reasons which discriminate positively against the interests of the inhabitants and reasons which prefer the interests of non-natives to those of the natives. The first class relates to non-promotion of the well-being of the inhabitants while the second refers to the 'utmost' directive. In particular, reasons directed towards the factual annexation of the territory by South Africa will be improper.

These improper reasons may appear either *ex facie* or by implication. In the case of the latter there is no need to infer that South Africa has been

¹ Op. cit. (above, p. 341 n. 5), pp. 184-8.

acting in bad faith. It is sufficient to look at the action taken and to look at the background—which will include facts about South Africa and the international community as well as about the territory—and ask whether the action would have been taken unless one of those improper reasons had been in the mind of the decision-maker. For instance, in the example of ten per cent of the education budget's being spent upon native education, it could reasonably be said that the percentage would have been much higher had not South Africa been concerned as a priority to keep European education at a standard of international excellence. It may be that the native educational standards are higher than anywhere else in Africa. That is irrelevant. It may be that South Africa is very concerned to raise native standards to those of the Europeans in the territory. That is irrelevant. The inquiry is simply to assess the action taken in the light of the Mandate and Article 2 (2). The concern with European education is outside the scope of the Mandate. It is a legally improper reason or purpose. It has had a determinative effect upon the action taken. It would arguably constitute an abuse of right by South Africa which breaches the Mandate.

CONCLUSIONS

The view of abuse of rights which appears from this study is different from that adopted by some. Certainly, it is not what Sir Hersch Lauterpacht described. It is, however, a systematization and extrapolation of the common concept of abuse of rights.

Any rule against the abuse of rights is based upon, and cannot exist apart from, the existence of a discretion in some person. The English law of nuisance provides some prohibition akin to the abuse of rights when it prohibits *A* from using his land in such a way as unreasonably to deprive *B* of the enjoyment of his (*B*'s) land.¹ *A*'s discretion as to how he uses the land is limited to this extent. English law, however, stops short of a general concept limiting the land-owner's discretion.² The law in the Occupier's Liability Act 1957 remains a category and not merely part of a general principle of occupiers' responsibility. Both deal with the effect of an act with no relation back to the reasons for acting.

English administrative law represents a considerable advance in this context, but it is an advance which flows from the nature of a discretion in law. It subjects a discretion to review for abuse if and only if the discretion itself, its context and conditions, can be found to contain some limitation of the reasons for which it is to be used. Not every discretion displays such

¹ An example showing the relation of intention here is *Hollywood Silver Fox Farm Ltd. v. Emmett*, [1936] 2 K.B. 468.

² *Bradford Corporation v. Pickles*, [1895] A.C. 587.

a limitation. Three such discretions in international law have been discussed above. Once a limitation of the reasons for which a discretion is to be used has been established, further analysis presents a number of distinct ways in which the discretion can be abused. But, while they are distinct ways, they maintain a strong inner coherence. No apology is made for reproducing the following long passage from the judgment of Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*:¹

When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles, the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there are to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty—those of course, stand by themselves—unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word ‘unreasonable’.

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word ‘unreasonable’ in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting ‘unreasonably’. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in *Short v. Poole Corporation*, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

¹ [1948] 1 K.B. 223 at 228–9.

In outline, this structure parallels that of *abus de droit* in French private law. It is not every 'right' which is reviewable for abuse but only those which are susceptible of limitation by reference to the reason for exercising them.¹ Whether one adopts the wide approach of Josserand² and judges the propriety of the actor's reasons by *le but social des droits*, or uses Mazeaud's own test of *l'individu avisé*,³ the orientation is unmistakably related to Lord Greene's formulation.

Upon translation into international adjudication, the jurisprudence shows sufficient coherence to posit a general principle prohibiting abuse of right in international law. English administrative law categories provide a content from which a general principle may be arrived at inductively: no person may, under international law, exercise a power for a reason, actual or inferred, which is contrary to the purpose or purposes for which international law contemplates the power will be used. The *Trail Smelter* case⁴ is, therefore, not an instance of abuse of right but of a 'tort' similar to the English law of nuisance: it is based on the effect of an action and does not refer back to the actor's reasons for acting. Prohibition of abuse of right may now be seen as a precise concept of definite content and common application. It may not be a prime instrument of peaceful change in the way Sir Hersch Lauterpacht envisaged it, but it is a potent rule of international law none the less.

¹ H. L. and J. Mazeaud, *Leçons de droit civil* (4th ed., by M. de Juglart, 1969), vol. 2, paras. 455-61.

² L. Josserand, *De l'esprit des droits et de leur relativité* (2nd ed., 1939).

³ Mazeaud, *op. cit.* (above, n. 1 on this page), para. 458.

⁴ *R.I.A.A.* 3 (1938 and 1941), p. 1905.

NOTES

RECOMMENDATIONS OF THE UNITED NATIONS AND MUNICIPAL COURTS*

By KRZYSZTOF SKUBISZEWSKI¹

The purpose of this note is to shed light on one aspect of the legal effects of non-binding resolutions of the United Nations, namely the extent to which national courts utilize such resolutions as a source of rules on which to base their decisions.

Though the absence of obligatory force is a trait they have in common, the recommendations differ considerably among themselves as to their purpose and nature. Some are quasi-legislative: they lay down principles or general rules of conduct which, however, cannot be equated with a true enactment of law as they have *per se* no binding effect. The various Declarations adopted by the General Assembly fall under this heading. Other resolutions deal with specific or individual situations. Their concern with a particular question, which they seek to resolve, gives them a quasi-executive character. The examples are recommendations (in contradistinction to mandatory decisions) on economic measures to be taken against the Republic of South Africa, Portugal, or the administration in Salisbury, Rhodesia, after the unilateral declaration of independence.

Non-binding resolutions of international organizations play a role in the formation, interpretation, and application of the law. To say that they have no obligatory force is to point only to one, though essential, characteristic. At the moment of its adoption the resolution may amount to nothing more than the expression of a wish. Through later developments, however, it can acquire a function and a significance that go beyond mere exhortation, political or moral.

A factor in these developments can be, and occasionally has been, the decisions of municipal courts. By applying or in some other way taking account of the resolutions the courts fulfil a creative role: the resolutions' potential effectiveness becomes a reality.

Courts have adopted differing attitudes towards the United Nations recommendations. One observes divergences of approach between courts of various countries as well as between those of the same country. There are several streams of judicial practice. They range from an outright rejection of the relevance of a United Nations recommendation to the isolated case of admitting its pre-eminence over domestic law. They will now briefly be considered.

Refusal to apply the recommendation

In some cases courts expressly refused to utilize the Universal Declaration of Human Rights.²

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Some of the cases bearing on human rights and analysed in the present note have been discussed by the writer in *Polish Yearbook of International Law*, 2 (1968-9), p. 80, at pp. 101-4.

¹ Dozent at Poznań University; Visiting Fellow, All Souls College, Oxford, 1971-2.

² G.A. Resolution 217 (III). In adopting the Declaration the Assembly emphasized that the instrument was to serve 'as a common standard of achievement', and States were to strive

An example of explicit denial that the Declaration is relevant is the *Beck's* case (1949).¹ Here the Special Court of Cassation of the Netherlands rejected the accused's argument that his trial was governed by the Declaration. As the Declaration, in this respect, did not create a bar to the prosecution of war criminals, and Beck was indicted under this heading, the Court's position was right irrespective of its views on the possible use of the Declaration in domestic penal proceedings. None the less the Court stated at the outset that the Declaration 'was not intended as a binding instrument',² whereby it generally implied, and this conclusion is borne out by the rest of the opinion, that an instrument of this kind must always be irrelevant in giving a judgment.³ This approach found a supporter in the Supreme Court of Ireland which, in *The State (Duggan) v. Tapley* (1950), said that the Declaration did not 'purport to be a statement of the existing law of nations. Far from it.' The Court quoted from its preamble and concluded that the Declaration, 'though of great importance and significance in many ways, [was] not a guide to discover the existing principles of international law'.⁴ Also, in *Ernst v. Federal Ministry of Justice* (1950),⁵ the Constitutional Court of Austria rejected the appellant's argument based on the Declaration by simply stating that the Declaration had 'not yet been incorporated in the national law of Austria'.

The instrument's non-treaty nature proved to be a bar to a plea based on the Declaration in a French case. In *Re Car* (1960),⁶ the appellant submitted that the decision of the French authorities, upheld by the Administrative Tribunal of Marseilles, not to extend his passport was contrary to the Declaration. In its judgment the *Conseil d'État* refused to consider the merits of the submission. The Declaration had been published in the *Journal officiel* but in the *Conseil's* opinion this was 'not enough to include it in the number of diplomatic treaties, regularly ratified and published by virtue of a Statute, the provisions of which alone were recognized by Articles 26 and 28 of the Constitution of 27 October 1946, then in force, as having the force of law,

progressively to take measures that would eventually secure its recognition and observance. Thus making of binding rules was a matter of future development. However, after some time, the Organization began to look at the Declaration as if it contained at least some standards that the Members were obliged to respect. Such was the United Nations approach to racial segregation (*apartheid*) in South Africa. It is an open question whether the Organization would take a similar stand with regard to any and every Article in the Declaration. None the less it did not hesitate to state generally, on more than one occasion, that all States should observe faithfully and strictly the Declaration, e.g. in Resolutions 1514 (XV) or 1904 (XVIII). For a brief discussion of judicial decisions, dating from the first decade after the adoption of the Declaration, see Schwelb, 'The Influence of the Universal Declaration of Human Rights on International and National Law', *Proceedings of the American Soc. of International Law*, 53 (1959), p. 217, at pp. 224-7.

¹ *Nederlandse Jurisprudentie* (1949), No. 437; *Annual Digest*, 1949, No. 93, p. 279.

² *Ibid.*, p. 280.

³ In some other cases involving war criminals the accused also invoked the Declaration. The courts rejected the accused's pleas in this respect, but did not say that the Declaration was altogether irrelevant. See the second decision of the Special Court of Cassation in the *Rauter* case (application for revision of conviction), *ibid.*, p. 546 and the decision of the Supreme Court of Denmark *In re Beat and Others, Ugesskrift for Retsveesen* (1950), p. 453; I.L.R. 17 (1950), p. 434, No. 146 at p. 437.

⁴ [1952] Ir. R. 62; I.L.R. 18 (1951), p. 336, No. 109, the quotation *ibid.*, at p. 342.

⁵ *Österreichische Juristen-Zeitung*, 6 (1951), p. 94; *U.N. Yearbook on Human Rights* (1950), p. 28.

⁶ *Journal du droit international*, 88 (1961), p. 405; I.L.R., vol. 39, p. 460. For the example of an earlier decision in which the *Conseil d'État* recognized the exclusively moral, in contradistinction to legal, nature of obligations resulting from the Declaration, see the case of *Nolay Elections, Recueil des arrêts du Conseil d'État* (1951), p. 189.

even when they were contrary to the provisions of internal French legislation [. . .].¹ If the French high court thereby admitted, as the only possibility, that the Declaration's relevancy could stand or fall on the issue of its being regarded as a treaty, then it may be criticized for its rather narrow outlook. For the Declaration might be regarded not as an autonomous instrument but as an interpretation of a binding treaty which acquired the force of law in the French system. On the other hand, the court dismissed the plea in a passage that was couched in brief and general terms. This passage might simply mean that in the court's view the Declaration, in contradistinction to treaties falling under the cited Articles of the Constitution, is non-binding and, therefore, irrelevant.

In a case of 1961 involving tax and customs duty offences¹ the Bavarian Constitutional Court decided that a constitutional appeal (*Verfassungsbeschwerde*) could not be based on the alleged violation of the Declaration. This judgment did not in itself bear on the municipal effect of the instrument, for domestic law usually limits the grounds of complaints alleging action contrary to the Constitution. Shortly before the rendering of the Bavarian judgment, another tribunal—the Federal Constitutional Court²—held that a constitutional appeal could not be founded on the European Convention on Human Rights; yet this treaty became part of German Law. What is of interest in the Bavarian case is the reason adduced: the Declaration 'contains no positive law that is directly enforceable in the Member States, but only common guide-lines'.

In *M. v. United Nations and Belgian State (Minister for Foreign Affairs)* (1966),³ the plaintiff contended that the failure to set up an appropriate court in which his claim against the United Nations could be heard was a breach of Article 10 of the Declaration. The United Nations enjoyed immunity from jurisdiction, and he argued that Article 10 made such immunity conditional upon the existence of an appropriate court. The Civil Tribunal of Belgium found that the Declaration was not applicable. The Tribunal said:⁴

[T]he Universal Declaration does not have the force of law. Its sole aim is to express the common ideal to be attained by all peoples and all nations, in order that by instruction and education respect for these rights and freedoms may be developed and that measures may be taken progressively to ensure that they are recognized and universally and effectively applied in the future. The principles of the Universal Declaration are already contained in general in the Belgian Constitution of 7 February 1831. The Declaration, which is merely a collection of recommendations, without binding force, has not been submitted for approval to the Belgian legislature.

However, the Tribunal went into the merits of the argument and concluded that the immunity of the United Nations from jurisdiction 'was not abrogated, either conditionally or finally, by the Declaration of 1948'.⁵

Finally, in *Roussety v. The Attorney-General* (1967),⁶ the High Court of Mauritius was faced with the objection that the Mauritius (Former Legislative Council) Order, 1966, was contrary, *inter alia*, to the Declaration. The Court rejected the objection by referring to the absence of an act of Parliament:⁷

The stipulations of international obligations, *unless enacted into laws by Parliament*, cannot, in principle, be enforced in municipal courts, and the right to enforce remains

¹ *Neue Juristische Wochenschrift*, 14 (1961), p. 1619; *U.N. Yearbook on Human Rights* (1961), p. 121, col. 2.

² *Entscheidungen des Bundesverfassungsgerichts*, vol. 10, p. 271, at p. 274.

³ *Pasicrisie Belge* (1966), vol. 3, p. 103; *I.L.R.*, vol. 45, p. 446.

⁵ *Ibid.*, p. 452.

⁶ *The Mauritius Reports*, 1967, p. 45; *I.L.R.*, vol. 44, p. 108.

⁷ *Ibid.*, pp. 68 and 130 respectively.

only with the high contracting parties (see *Vajesingji Joravarsingji v. Secretary of State for India* (1924), L.R. 51. I.A. 357, 360). Indeed, it has on occasions been observed that such texts and solemn declarations are only as good as the word and the intention of those who apply them.

The Court added that the British Government might 'conceivably be called to account before an international body or tribunal, if it [had] transgressed a treaty or other international obligation to which it had subscribed' (in the case there was also the question of the Order's lawfulness in the light of the European Convention on Human Rights).¹ The Court added that it had 'no power to declare *ultra vires* a piece of legislation for this Colony by the Queen in Council in virtue of Her reserved prerogative powers, even if it is in violation of such treaty or obligation'.²

Legislative incorporation of recommendations

It clearly follows from at least some of the cases discussed in the preceding paragraph that the municipal courts would not object to the relevance of the United Nations Resolution had it been incorporated, through some kind of legislative action, into the municipal law. When the courts speak of the requirement of this action, they imply that they are not willing simply to assimilate the non-binding resolutions with the treaties under which they have been adopted. The practice of some countries³ yields the doctrine that *binding* resolutions of a law-making nature have the same place and status, in the municipal legal order, as the treaty which authorizes their enactment. Here the consent of the legislature to the treaty is being interpreted extensively: it is meant also to cover the future law-making by international organs set up under the treaty. It is, no doubt, a useful legal fiction, for it facilitates the domestic application of rules made by international organizations.

However, there is hardly any chance of this model's being extended to acts of a non-mandatory nature. The procedure in question presupposes a minimum of identity of legal characteristics between the organization's constitutional treaty and the organization's resolution. That condition is satisfied by the binding force of the two. When, on the other hand, the resolution is a recommendation it cannot be put on an equal footing with the treaty,⁴ unless the municipal judge should go to very great lengths to secure the domestic compliance with the standards established by the United Nations. The judicial decisions discussed in this note do not permit the discovery of such a trend.

A fortiori, one must exclude, for our purposes, the resort to another means of giving municipal courts the possibility of applying international resolutions; namely, the recognition, by municipal law, that the publication of the resolution (whatever its name) in the official journal or bulletin of the organization is sufficient to make it effective in

¹ European Convention for the Protection of Human Rights and Fundamental Freedoms, U.N. Treaty Series, vol. 213, p. 221.

² *The Mauritius Reports* (1967), p. 69; I.L.R., vol. 44, p. 130.

³ Such is, for instance, the practice of Switzerland. See the decision of the Swiss Federal Tribunal in *Lang und Legler, Arrêts du Tribunal fédéral*, 76 IV, p. 43, and the position of the legislature (the National Council and the Council of States) with regard to the approval of the International Sanitary Regulations adopted by the World Health Organization, *Annuaire suisse de droit international*, 10 (1953), p. 203. Swiss practice is discussed by Dominicé, 'La Nature juridique des actes des organisations et des juridictions internationales et leurs effets en droit interne', *Recueil des travaux suisses présentés au VIII^e Congrès international de droit comparé* (Basel, 1970), p. 249, at pp. 254-5 and 257.

⁴ Dominicé, *ibid.*, pp. 256-7, explicitly denies the possibility of applying this procedure to non-binding resolutions in Switzerland.

the domestic law. This procedure has been resorted to with regard to the self-executing enactments of the European Communities.¹ But again this method can govern only binding acts.

A different procedure for introducing international resolutions into municipal law consists in voting a statute or bill empowering the appropriate organ (usually the executive) to make such provision as may be necessary to apply the resolutions of a given international organization. Whether this method is of any avail with respect to recommendations depends on what limits the statute or bill in question establishes for the delegated legislation which it authorizes. Thus the United Nations Act, 1946, in the United Kingdom² permits the Crown in Council to enact Orders giving effect to the decisions of the Security Council that fall under Article 41 of the Charter and relate to measures short of use of armed force. This provision excludes Orders in Council which would secure execution of recommendations. Section 5 of the United Nations Participation Act of 1945³ gives the President of the United States the power to prescribe 'orders, rules and regulations' to apply decisions which the Security Council may take pursuant to Article 41.

There always remains the possibility of *ad hoc* legislation. Especially in the economic sphere *sensu largo*, governments usually possess powers of delegated legislation, and often they enjoy a certain latitude in using them. United Nations recommendations on economic measures against South Africa and Portugal have been implemented in some countries through decrees or ordinances.⁴ This procedure turns recommended norms and standards into rules of municipal law. It is submitted that when the matter comes before a national court the originally non-binding nature of the resolution cannot influence the enforcement of the domestic legislation. For what is here applied is not the recommendation but municipal law.

The municipal implementation of United Nations sanctions against Rhodesia is of limited interest to this note, for very soon the Security Council passed from the stage of optional (1965)⁵ to mandatory sanctions (1966 and 1968).⁶ Thus legislation which originally might have been enacted to implement non-mandatory measures,⁷ began, in a short time, to be applied in execution of subsequent resolutions which were obligatory. Some States took legislative steps only after the passing of the latter.⁸ But they also constitute a ready model for the municipal operation of recommended measures, provided the government is willing to act. Equally, the point is illustrated by the position of States which were not Members of the Organization and yet became associated with the United Nations policy towards Rhodesia. The decisions of the

¹ e.g. Article 3 of the French decree 53-192 of 14 March 1953, *Journal officiel de la République Française: Lois et décrets* (1953), p. 2436. Kiss, 'Nature juridique des actes des organisations et des juridictions internationales et leurs effets en droit interne' (*Travaux et recherches de l'Institut de Droit Comparé de Paris, VIII^e Congrès international de droit comparé, contributions françaises*), *Études de droit comparé* (1970), p. 259, at pp. 261-2. See also the European Communities Bill, 1971.

² 9 and 10 Geo. VI, c. 44.

³ 50 Stat. 620.

⁴ For instance in the United Arab Republic (now the Arab Republic of Egypt). The Egyptian legislative measures are referred to by Shihata, in a paper submitted to the Bellagio Conference of 1972 on *Individual Rights and the State in Foreign Affairs* (to be published by the American Society of International Law).

⁵ S.C. Resolution 217.

⁶ S.C. Resolutions 232 and 253.

⁷ e.g. Belgian legislative measures of 1965 and beginning of 1966 discussed by Waelbroeck, paper submitted to the Conference referred to above, n. 4 on this page.

⁸ e.g. French *avis* of 1967 and decree of 1968, *Journal officiel de la République Française: Lois et décrets* (1967), p. 1999 and (1968), pp. 8215 and 8236.

Security Council could not be obligatory for those States unless they agreed to accept them. The attitude of the Federal Republic of Germany and Switzerland is relevant here.

The Federal Republic of Germany, a non-Member in the sixties,¹ decided to take part in the application of the sanctions. On the basis of general legislation relating to foreign trade the Federal Government enacted ordinances dealing specifically with Rhodesian commerce.²

Switzerland, a permanently neutral country outside the United Nations, did not accept the Resolutions of the Security Council on Rhodesia. However, she agreed to take steps ensuring that Rhodesian trade would 'be given no opportunity to circumvent United Nations sanctions on Swiss territory'. Thus Switzerland prohibited the export of war supplies to Rhodesia; the prohibition was based on a government decree of 1949. The Government also kept imports from Rhodesia at what had been described as the level of 'normal flow'. The latter measure was introduced through specific governmental decrees and ordinances.³

It follows from the foregoing considerations that there is ample opportunity in practically any municipal legal order for integrating into it the recommendatory resolutions of the United Nations. But political apathy and caution are a difficulty. In fact, the United Nations recommendations have rarely been incorporated into the domestic systems. Yet municipal judges have on occasion been bolder than legislators and have utilized the resolutions, especially those which lay down, or bear on, the principles and rules of general law. The reader's attention may now be turned to the relevant cases.

Recommendations as evidence of law

Litigation involving the Anglo-Iranian Oil Co. supplies some examples in which the municipal courts cited a United Nations Resolution in support of their views on general (customary) international law. In the *Anglo-Iranian Oil Company v. Idemitsu Kosan Kabushiki Kaisha* (1953),⁴ the District Court of Tokyo held that the Oil Nationalization Law adopted by Iran in 1951 coincided 'in its ideas with the recommendations adopted by the General Assembly concerning the exploitation of natural resources'.⁵ What the Court had in mind was Resolution 626 (VII). The Court did not say that the General Assembly's ascertainments were good law. It seems that the Court adduced the resolution as one of the arguments (not the basic one) in favour of the view that giving effect to the Iranian Law would not be contrary to the requirements of public policy. On appeal, the Higher Court of Tokyo repeated that the Law was enacted in accordance with the resolution; it was one of the arguments supporting the conclusion that the Law

¹ The Federal Republic joined the United Nations in 1973.

² Law on Foreign Trade of 28 April 1961 thereafter amended, *Bundesgesetzblatt* (1961), vol. 1, p. 481 and (1964), vol. 1, p. 821. For the ordinances issued by virtue of this Law, see *ibid.* (1967), vol. 1, p. 193. For comments, see Ipsen, *Aussenwirtschaft und Aussenpolitik: Rechtsgutachten zum Rhodesien-Embargo* (1967); von Schenck, 'Das Problem der Beteiligung der Bundesrepublik Deutschland an Sanktionen der Vereinten Nationen, besonders im Falle Rhodesiens', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 29 (1969), p. 257; Seidl-Hohenveldern, paper submitted to the Conference referred to above, p. 357 n. 4.

³ Swiss legislative measures are reported by Caflisch in *Annuaire suisse de droit international*, 25 (1968), at p. 278 and 26 (1969-70), at pp. 86-7. For comments, see Bindschedler, 'Das Problem der Beteiligung der Schweiz an Sanktionen der Vereinten Nationen, besonders im Falle Rhodesiens', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 28 (1968), p. 1 and Caflisch, paper submitted to the Conference referred to above, p. 357 n. 4.

⁴ I.L.R. 20 (1953), p. 305.

⁵ *Ibid.*, p. 309.

was not contrary to international law.¹ In the case of the *Anglo-Iranian Oil Company Ltd. v. SUPOR (Unione Petrolifera per l'Oriente, SPA)* (1954),² the Civil Court of Rome invoked the same resolution as constituting 'a clear recognition of the international lawfulness of the Persian Nationalization Laws' of 1951.³

In several cases courts have resorted to the Declaration of Human Rights as evidence of law. While in some instances the courts simply took guidance from the Declaration, in others it appears as firm evidence of binding principles. The evolution from the former attitude to the latter is shown by some Italian decisions.⁴

In *Auditeur Militaire v. Krumkamp* (1950),⁵ the Military Court of Brabant said that in its search for the 'principles of international law arising out of the usages established by civilized nations, the laws of humanity, and the requirement of the public conscience', it was guided by the Declaration. The Court quoted its Article 5 prohibiting torture and similar treatment.⁶ In the *Tovt* case (1954)⁷ which involved the judicial establishment of the statelessness of the petitioner, the Court of Taranto, Italy, came to the conclusion that 'though not having the force of a binding rule of law, the provisions of the Declaration nevertheless [constituted] guiding principles of the highest moral value'. In particular, the court quoted Article 15 of the Declaration as 'an expression of [the] tendency' that rejects 'any form of automatic rule in the attribution of citizenship to individuals, even in cases of transfers of territory' and regards 'citizenship as an essentially voluntary relationship'.⁸

Another Italian court went much further with regard to the same Article. In *Ministry of Home Affairs v. Kemali* (1962)⁹ the Court of Cassation in Rome dealt with the question whether a native of Libya (which, till 1947, was Italian territory) who resided in Italy, was an Italian national or a stateless person. The Court decided that he was an Italian citizen. The Court based its conclusion on provisions of various Italian laws and the Treaty of Peace of 1947 as well as on previous judicial decisions. The Court attached particular importance to the rule of the Law on Citizenship of 1912, that, certain exceptions apart, Italian citizenship could only be lost by the acquisition of the nationality of another State. This rule, for the Court, was in turn 'an application of another fundamental principle which [was] common to the law of every modern State, namely, that statelessness [was] to be considered as an exceptional status'. The Court then referred to Article 15 of the Declaration. This U.N. resolution, the Court said, was 'more than a mere declaration of intent from the point of view of Italian municipal law'. The Court spoke of 'a general principle of law which must be held to have become part of our law'—the singular would suggest that the avoidance of statelessness constituted that principle, but the construction of the phrase and its context rather favour the view that the Court regarded all the standards encompassed by the Declaration as falling under the heading of general principles. The incorporation of the standard or standards into Italian law resulted, according to the Court, from the Constitution and from the Law of 1955 which brought into force in Italy the European

¹ Ibid., p. 313.

² Ibid. 22 (1955), p. 23.

³ Ibid., pp. 40-1. Cf. also *Petrolifera Muntenio v. Child*. *Rivista di diritto internazionale*, 47 (1964), p. 639.

⁴ Other Italian decisions were less clear; cf. Italian Constitutional Court, decision No. 72 of 30 May 1963, *U.N. Yearbook on Human Rights* (1963), p. 180, col. 2.

⁵ *Pasicrisie Belge* (1950), vol. 3, p. 35; I.L.R. 17 (1950), p. 388, No. 122.

⁶ Ibid., p. 390.

⁷ *Giurisprudenza Italiana* (1954), Part I, vol. 2, p. 573; *U.N. Yearbook on Human Rights* (1954), p. 169, col. 1.

⁸ Ibid., p. 171, col. 1.

⁹ *Foro Italiano*, 85 (1962), Part I, col. 190; I.L.R., vol. 40, p. 191 (the passages quoted are at p. 195).

Convention on Human Rights,¹ i.e. a treaty which in its preamble, the Court emphasized, referred to the Declaration. This writer applauds the attitude adopted by the Italian Court with regard to the Declaration; however, one cannot fail to recognize that the Court went a long way when it based the municipal effect of one instrument on a reference to it in the preamble of another, only the latter being incorporated into the domestic law by virtue of specific legislation. The case shows that the heart of the matter is not the binding or non-binding nature of the Declaration, but the will of the courts to make use of it.

A further step has been taken in the case involving *Yugoslav Refugees* (1964).² Here the Court of Appeal at Milan seems to have regarded the Declaration as setting forth 'the generally acknowledged rules of international law'—the phrase taken from Article 10 of the Italian Constitution—and the Court placed the Declaration in the framework of this provision. The case involved more particularly the standard expressed in Article 14 of the Declaration. However, the Court made pronouncements which diluted the autonomous importance of the Declaration: the 'binding quality of this provision' also derived from the treaties to which Italy was party (Convention on the Status of Refugees;³ European Convention on Human Rights). Some of the language used by the Court might suggest that the Declaration engendered the development of the law of human rights, and the sixteen years which elapsed from its adoption sufficed to make the Declaration good law. The Court referred to the 'effective recognition and observance' of human rights (as stated in the Declaration) during that period.

In some cases courts took account of the General Assembly Resolution 95 (I) affirming 'the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal' and the Resolution 96 (I) on genocide. In *Re Liebehenschel and Others* (1947)⁴ (the so-called Auschwitz Trial) the Supreme National Tribunal of Poland established the role of the Nuremberg judgment⁵ as a precedent for municipal courts by referring, *inter alia*, to Resolution 95 (I).⁶ In the *Eichmann* case (1962)⁷ one of the objections of the appellant against the jurisdiction of the Israeli District Court was that the Law of 1950, on which this jurisdiction based itself, constituted *ex post facto* legislation. The Supreme Court of Israel came to the conclusion that the crimes set out in the Law of 1950 had always been forbidden by international law and, consequently, that Law did not conflict with the principle *nulla poena*. To dispel any doubts regarding the immemorial nature of the Nuremberg principles, the Court referred to Resolutions 95 (I) and 96 (I).⁸

Application of the Human Rights Declaration in conjunction with municipal law

The Italian decisions in the *Kemali* and *Yugoslav Refugees* cases are examples of such an application. Some further instances may be cited.

¹ Article 10, paragraph 1, of the Constitution provides that the 'Italian legal order conforms to the generally acknowledged rules of international law'. The remaining paragraphs deal with the position of aliens. Law No. 848 of 4 August 1955 authorized the ratification of the Convention, *Le Leggi* (1955), p. 1077.

² *U.N. Yearbook on Human Rights* (1964), p. 160, col. 1.

³ *U.N. Treaty Series*, vol. 189, p. 137.

⁴ *Siedem Wyroków Najwyższego Trybunału Narodowego* (1962), p. 137.

⁵ Miscellaneous No. 12 (1946), H.M.S.O., Cmd. 6964; *Annual Digest*, 1946, p. 203.

⁶ Reports cited in *Siedem Wyroków* (cited in full in n. 4 on this page), p. 251.

⁷ *Attorney-General of the Government of Israel v. Adolf Eichmann*, I.L.R., vol. 36, p. 5. The judgment of the Supreme Court is on p. 277.

⁸ *Ibid.*, pp. 296-7.

In the cases of *Borovsky* and *Chirskoff*¹ the Supreme Court of the Philippines based its decisions, *inter alia*, on the Declaration. In the case of *Empress Guatemalteca de Electricidad* (1952),² the Supreme Court of Guatemala gave 'full effect' to Article 10; however, the standard therein contained had already become part of the law of Guatemala. Article 3 of the Declaration figured as the first ground for the order of the President of the Court of First Instance of Courtrai, Belgium,³ which concerned the release of a person from a mental institution. In another case the same Court refused to deprive a person of legal capacity and explained that the deprivation, if imposed, would run contrary to that Article.⁴

Some courts relied on the Declaration when they decided the question whether a particular right was one of human rights. Thus in *Re Flesche* (1949),⁵ the Special Court of Cassation of the Netherlands invoked the Declaration and found no basis for the contention that the so-called principle of speciality in extradition protected a war criminal. In *Re Krüger* (1951),⁶ the Council for the Restoration of Legal Rights (Judicial Division) at The Hague cited Article 15 (2) of the Declaration in support of the rule that 'no State is competent or in a position *propria auctoritate* to deprive of their citizenship aliens who are resident on its territory'.⁷

In a paternity case decided in 1952, the Supreme Court of Guatemala⁸ referred to Articles 16 and 25 (2) of the Declaration; they did not seem to contain rules that would specifically cover the investigation of paternity and its results. In the *Caligaris* case (1952),⁹ the Court explained that certain rights embodied in Articles 3, 9 and 17 could not be enforced in the event of an international conflict. Nor would the State be denied the power to exclude or curtail certain remedies falling under Article 8 if a paramount public interest so demanded.¹⁰ The Court at Courtrai, in one case,¹¹ gave an interpretation of Article 18 and on the basis thereof refused to acknowledge the existence of a right.

In several cases the courts interpreted the municipal law so as to harmonize it with the Declaration and thus to avoid a conflict between the two sets of standards. This was the attitude adopted by the Penal Chamber of the Supreme Court of the Netherlands in a case involving the freedom of the press,¹² and by the Federal Constitution Court (Western Germany) in a case concerning the joint assessment of the income of husband and wife.¹³ The unwritten rule to the effect that the domestic legislation is to be construed so as to remain in harmony with the Declaration may invest the latter with the role of a criterion for ascertaining what accords with public policy in the field of human rights. This seems to have been the position of the Belgian courts in the cases of *Pietras* (1951),¹⁴ *Bukowicz* (1952)¹⁵ and *Vanderginste v. Sulman*.¹⁶ In 1955 the Court

¹ U.N. Yearbook on Human Rights (1951), pp. 287-8.

² Ibid. (1952), p. 103, col. 1.

³ Ibid. (1954), p. 21, col. 2.

⁴ Ibid. (1957), p. 17, col. 1.

⁵ *Nederlandse Jurisprudentie* (1949), No. 548; *Annual Digest*, 1949, p. 266, No. 87, at p. 269.

⁶ *Rechts-herstel* (1951), No. 108; I.L.R. 18 (1951), p. 258, No. 68.

⁷ Ibid., p. 259.

⁸ U.N. Yearbook on Human Rights (1952), p. 101, col. 2, at p. 102, col. 1.

⁹ Ibid., p. 101, col. 1, at col. 2.

¹⁰ Case involving adulteration of coffee, *ibid.*, p. 102, col. 2.

¹¹ Ibid. (1957), p. 16, col. 1.

¹² Ibid. (1951), p. 251. The Court's reference to the Declaration was casual; it was made in the context of 'modern developments' regarding the nature of constitutional rights; see p. 252, col. 1.

¹³ *Entscheidungen des Bundesverfassungsgerichts*, 6 (1957), p. 55.

¹⁴ U.N. Yearbook on Human Rights (1951), p. 15. In this case emphasis was put on the impossibility of allowing foreign law to obstruct the application of Belgian law on nationality the reference to the Declaration constituted a secondary argument.

¹⁵ Ibid. (1953), p. 21.

¹⁶ Ibid. (1956), p. 23.

of First Instance of Courtrai¹ recognized the admissibility of naturalization by Belgium even if this was contrary to the foreign applicant's own law. In support of its decision the Court referred, *inter alia*, to 'the trend in modern law' to permit a change of nationality when the ties with the person's native country became weakened or had never been close; 'this idea has been explicitly sanctioned by the Universal Declaration of Human Rights'. It also found support for its other decisions in the Articles of the Declaration.² In the *Labavarde and Anor* case (1965),³ the High Court of Mauritius construed Article 11, para. 1, of the Declaration so as to harmonize it with the relevant provisions of the Mauritius (Constitution) Order, 1964.

Sometimes the court would mention the Declaration in support of its decision. One example is the American case of *Wilson v. Hacker* (1950).⁴ Another example is the *Extradition of Greek National (Germany)* case (1955),⁵ where the Federal Supreme Court admitted that the Constitution of Federal Germany sought, 'generally speaking, to follow' the Universal Declaration of Human Rights and it referred to Article 14 of the Declaration as additional support for its opinion on one of the problems discussed in the judgment. In *Fallimento Ditta Maggi v. Ministry of Finance* (1959),⁶ the Tribunal of Rome cited the Declaration as one of the sources of law on which the Tribunal relied in deciding the case. The Declaration was mentioned in support of the Court's view on the meaning of one of the provisions of the Italian Constitution. The significance of the Declaration for the court's decisions in these cases is not entirely beyond doubt.⁷

Whether recommendations are pre-eminent over municipal law

It may be observed that this question hardly arises. The cases discussed in this note clearly show that while in some instances courts refused to give the recommendations the status of sources in the municipal legal order and thus avoided the problem of conflict,⁸ in other instances the non-binding resolutions, if utilized at all, have been harmonized with domestic rules and generally regarded as a subsidiary source.

¹ U.N. Yearbook on Human Rights (1955), p. 16.

² Ibid. (1957), p. 17, col. 2. However, there were Belgian decisions which did not treat the Declaration as a relevant yardstick. The courts admitted that in certain matters national law and policies must prevail; cf. *Vanderginste v. Vanderginste*, *ibid.* (1956), p. 23. The conclusion is rightly drawn by Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (1966), p. 231. This approach found expression also in the decisions by courts of other countries. In *Biswambha Singh and Another v. The State of Orissa* (1957), decided by the High Court of Orissa, the petitioners challenged the constitutional validity of a statute on the basis, *inter alia*, of Article 17 of the Declaration. Their appeal to the High Court failed, but the Court admitted that in different circumstances the Declaration 'might possibly be invoked in favour of the petitioners, on the doctrine of wise use of public policy'. All India Rep., 1957, Orissa 247; I.L.R. 24 (1957), p. 425, at p. 427.

³ *The Mauritius Reports* (1965), p. 72, at p. 74; I.L.R., vol. 44, p. 104, at p. 106.

⁴ 101 N.Y.S. 2d 461 (Sup. Ct. 1950).

⁵ *Neue Juristische Wochenschrift*, 8 (1955), p. 1365; I.L.R. 22 (1955), p. 520, at p. 524.

⁶ *Foro italiano*, 83 (1960), Part I, col. 505; I.L.R., vol. 28, p. 607.

⁷ Examples where the place of the U.N. Resolution is still more ambiguous are the *Extradition (Ecuadorian National)* case (1953) decided by the Federal Supreme Court (Western Germany), *Neue Juristische Wochenschrift*, 6 (1953), p. 392; I.L.R. 20 (1953), p. 370, and the *Mandoza-Martinez and Cort* cases (1963), decided by the Supreme Court of the United States, 372 U.S. 144, at 162 n. 1; I.L.R. 34, p. 108, at p. 112 n. 1.

⁸ An illustration of this attitude is the *Kröger* case (1963), where the Court of Appeal of Bologna refused the extradition of a person accused of genocide in spite, *inter alia*, of the G.A. Resolution which made such persons extraditable and not qualifying for protection under the rubric of political crimes. *Foro italiano*, 86 (1963), p. 151.

There are, however, some decisions which warrant asking the present question, even if it were only for the sake of academic interest.

In the case of *Sei Fujii v. State of California* (1950),¹ the District Court of Appeal of the second appellate district of California held that the Alien Land Law of California was unenforceable because it was contrary to the Charter of the United Nations. In particular, the restrictions imposed by the law on a certain category of aliens were incompatible with Article 17 of the Declaration of Human Rights. However, this decision did not become part of the case law of California because the Supreme Court of that State ordered the case to be transferred for hearing before it. Though the latter declared the Alien Land Law unconstitutional,² it did so exclusively on grounds of municipal law (denial of equal protection: the Fourteenth Amendment). The Court found that none of the United Nations provisions invalidated the Land Law. It may be added that even had the appeal judgment not been superseded by the Supreme Court decision, its significance for our problem would be nil; the emphasis was on the Charter, not on the Declaration. In the decision denying the rehearing of the case³ the Court of Appeal explained that it 'did not place reliance on the Declaration in support of the conclusion reached'. The reference 'was made to that document [. . .] as especially emphasizing the purposes and guarantees of the Charter'.

On the other hand, the *Klahr Ehlert* case (1952),⁴ is an example, though isolated, of the superiority of the recommendation over the letter of municipal law. In this case the Supreme Court of Guatemala refused to apply the otherwise clear legislation on treatment of enemy property and in fact adapted it to a rather far-fetched interpretation of Article 15 of the Declaration. Klahr Ehlert was a German national domiciled in Guatemala. His conduct showed that he had no links with Nazi Germany, he made Guatemala his home, his children were born and lived there, and he had been spending all his earnings in that country. When Guatemala entered the war against Germany, he behaved loyally towards the former. None the less he was an enemy alien, and the Government issued an order for the expropriation of, and transfer of title to, his property. The Administrative Tribunal rescinded the order and, on appeal, the Supreme Court upheld the rescission. The Court cited Article 15 (the right to a nationality and the prohibition against being deprived of it) and looked at the case from an unorthodox angle: the dispossession measures subjected Klahr Ehlert, in the eyes of the Court, to threats that he must adopt another (i.e. local) nationality against his will. It seems that the Court understood Article 15 as imposing the duty to create a guarantee against the denial of the right to retain the nationality of the individual's own choice. On this ground, the Court refused to give sanction to the regular application of the law on enemy property.

In *Diggs v. Shultz* (1972),⁵ plaintiffs sought relief against the importation of a certain material (metallurgical chromite) into the United States from Rhodesia. These imports

¹ 217 P. 2d 481 (Calif. Dist. Ct. App., 2nd Dist., 1950); *American Journal of International Law*, 44 (1950), p. 590. For comments on this decision, see Hudson, 'Charter Provisions on Human Rights in American Law', *ibid.*, p. 543; Wright, 'National Courts and Human Rights—The Fujii Case', *ibid.* 45 (1951), p. 62; and Preuss, 'Some Aspects of the Human Rights Provisions of the Charter and Their Execution in the United States', *ibid.* 46 (1952), p. 289. There is a bibliographical note in I.L.R. 19 (1952), p. 316.

² 242 P. 2d 617 (Sup. Ct. 1952); I.L.R. 19 (1952), p. 312. The decision of the Supreme Court is discussed by Fairman, 'Finis to Fujii', *American Journal of International Law*, 46 (1952), p. 682.

³ 218 P. 2d 595, at 596 (Calif. Dist. Ct. App., 2nd Dist., 1950).

⁴ *U.N. Yearbook on Human Rights* (1952), p. 103, col. 2.

⁵ 470 F. 2d 461 (1972); *American Journal of International Law*, 67 (1973), p. 547.

were in violation of the Security Council Resolutions 232 and 253, but they were permitted by the so-called Byrd Amendment to the Strategic and Critical Materials Stock Piling Act of 1971. The plaintiffs did not succeed, the courts finding for the defendants. The case lies beyond the purview of this note because it concerns a binding text. It was, however, an interesting attempt to establish the pre-eminence of a United Nations Resolution over municipal law.

Conclusion

It is not always possible to define, in precise terms, the role which the recommendations of the United Nations play in the formation of international law. Decisions of national courts, though they do not follow one doctrine, and are far from being uniform in their treatment of the recommendations, help to clarify the elusive process whereby a recommended standard becomes progressively transformed into a legal rule. Such a standard is rarely subject to legislative incorporation into municipal law. When this happens the domestic operation of the recommendation is achieved, while the court's task is reduced to application of municipal rules. The matter then ceases to be of direct interest to the international lawyer. What is worth while noting, in the light of the foregoing considerations, is the utilization of quasi-regulative resolutions by several domestic courts without any express authorization on the part of the law of the forum. The unity of law, municipal and international, is, perhaps, thereby emphasized and enhanced. And in domestic litigation, as the discussed cases amply show, there is little danger of the court's mistaking political postulates for law.

HISTORICAL ASPECTS OF THE DOCTRINE OF HOT PURSUIT*

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I

In recent years the right of hot pursuit in international law has attracted renewed attention. States have even claimed the right to pursue enemy troops over land frontiers by extending the traditional doctrine of the right of pursuit of ships onto the high seas.¹ The legitimacy of such uses or extensions of the doctrine have been amply argued elsewhere.² Adaptation of the doctrine is, however, characteristic of the way in which it has developed, i.e. by changing its function and juridical basis in response to the interests of States. It is the purpose of this note to study the origins and gradual acceptance of the doctrine; for it is doubtful whether the right of hot pursuit can be said to have been received fully into the body of international law until it was incorporated in the Geneva Convention on the High Seas in 1958. As late as 1936, a French court dismissed without question the allegation that there existed a customary rule of international law allowing pursuit of a foreign ship out of the territorial waters into the high seas for infringement of the laws of the coastal State.³ It is not proposed to study how and why particular limitations of the doctrine came to be admitted; the long history of the development and adaptation of the doctrine in itself provides sufficient interest. Custom in this case has taken over a century to crystallize.

The current doctrine of hot pursuit is contained in Article 23 of the Geneva Convention on the High Seas, 1958:

The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters or the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted . . .

The juristic origins of the doctrine,⁴ however, appeared over two hundred years earlier.

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¹ Such claims have been made in particular by the United States Government in connection with the pursuit of North Vietnamese troops across the Cambodian frontier. For the U.S. statement on the legality of such pursuit, see *American Journal of International Law*, 63 (1969), p. 122. Israel has made similar claims in pursuing Arab guerrillas across her borders (*The Times*, 8 April 1968).

² Poulantzas, *The Right of Hot Pursuit in International Law* (1969), and in *Revue hellénique de droit international*, 14 (1961), p. 196. For earlier discussions of the right of the United States to pursue Mexican bandits across her border, see Hershey, 'Incursions into Mexico and the Doctrine of Hot Pursuit', *American Journal of International Law*, 13 (1919), p. 557; Hackworth, *Digest of International Law* (1940-43), vol. 2, pp. 282-300.

³ Case of *Ernest and Prosper Everaert*, II (1936), *Annual Digest*, 1935-37, Case 112.

⁴ For theories as to the similarities between the common law doctrine of fresh pursuit and the International Law doctrine of hot pursuit, see Professor Glanville Williams, 'The Juridical Basis of Hot Pursuit', this *Year Book*, 20 (1939), p. 83; Beck, 'The Doctrine of Hot Pursuit', *Canadian Bar Review*, 9 (1931), p. 85 at 249-55; Piggott, *Nationality* (1907), Part 2, p. 35.

Glanville Williams demonstrates the similarities between the two doctrines both in detail and in the broad juridical basis; but he claims no particular connection between the two doctrines. He says: 'The acceptance of the right of pursuit seems to owe a great deal to the practice of

The first mention of the idea seems to have appeared in Bynkershoek's *Quaestionum Juris Publici* in 1737.¹ He states that it is not lawful for enemies to commit hostilities on neutral territory, nor to attack in a neutral port. But, he says, 'it is one thing to begin an attack, quite another to press on in the heat of an engagement'. Thus he questions 'whether it is lawful to pursue an enemy (into neutral waters) . . . if we have found him on the open seas and are pursuing in the heat of battle'. He answers that 'the weight of the argument is in favour of permitting it'.²

Bynkershoek was quite clearly speaking in the context of war, and of a pursuit undertaken from the high seas into neutral waters. The next mention of the right of hot pursuit appeared some twenty years later in a book by Richard Lee, *A Treatise of Capture in War*. The first edition of this appeared in Britain in 1759 and though quoted in various places³ as an authority for the right of hot pursuit, is in fact no more than a free translation of Bynkershoek's own work.⁴ In the second edition which was published in 1803 the debt to Bynkershoek was admitted, and references to Bynkershoek appear throughout the text. So far as the content of Lee's book is concerned, there is really no difference on the question of hot pursuit between his and Bynkershoek's opinions.

The first time that judicial notice was taken of the doctrine seems to have been in *The Anna*,⁵ an English prize case, decided in 1805 by Sir William Scott. During the war between Great Britain and Spain, an American ship had been captured by a British privateer within one and a half miles off the Mississippi mud islands, held to be within United States neutral waters. One of the arguments put forward by the British for justifying the seizure was based on the right of pursuit from the high seas, whereby the act of capture is deemed to have taken place where the pursuit is commenced. Lord Stowell accepted the argument subject to certain qualifications relating to the method and place of capture:

The authority of Bynkershoek is cited on this point. True it is, that that great man does intimate an opinion of his own to that effect, but with many qualifications and as an opinion, which he does not find to have been adopted by any other writers. I confess I

Great Britain and the United States . . . But it does not follow that there has been any borrowing from the common law of fresh pursuit; the rule is so natural that it was probably worked out spontaneously' (p. 92 n. 1). The justification which he gives for both rules is that of the sanctity of territorial jurisdiction, so that 'the time of capture is to be dated from the time of pursuit'. He explains that the common law doctrine has declined in importance because jurisdiction itself is a lesser issue now, whereas in international law jurisdiction still plays a crucial role (p. 87).

¹ Both Chancellor Kent in his *Commentaries on American Law* (10th ed., 1860), vol. 1, and Halleck, *International Law* (4th ed., 1908), vol. 2, pp. 168-9, also ascribe the doctrine to Casaregis. If this is correct then Casaregis would have been an earlier reference than Bynkershoek, since his *Discursus Legales de Commercio* appeared in Florence between 1719 and 1729. The two references in Casaregis's work are Disc. xxiv n. 11 and Disc. clxxiv n. 11. However, according to Glanville Williams, loc. cit. (in the preceding note), p. 88, Casaregis does not deal specifically with the question of hot pursuit, but is merely concerned with the general question of capture in neutral waters, saying at the first place cited that such a capture is good as against the enemy, bad *vis-à-vis* the neutral. At the second place cited he states that it is entirely unlawful. Even if Casaregis was an earlier mention of the doctrine, it is thought that the doctrine in fact developed from Bynkershoek's writings, which were taken over by Richard Lee.

² Bynkershoek, *Quaestionum Juris Publici* (1737), Book I, Chapter VIII, translated by Tenney Frank (1930), pp. 54-9, especially p. 56.

³ e.g. *R. v. The North*, [1905] 11 B.C.R. 473; Westlake, *International Law* (2nd ed., 1904-13), vol. 1, p. 173, vol. 2, p. 231.

⁴ This was discovered apparently by Nussbaum in his *Concise History of the Law of Nations* (1953), p. 172.

⁵ 5 C. Rob. 373 (1805).

should have been inclined to have gone along with him, to this extent, that if a cruiser, which had before acted in a manner entirely unexceptionable, and free from all violation of territory, had summoned a vessel to submit to examination and search, and that vessel had fled to such places as these, entirely uninhabited, and the cruiser had without injury or annoyance to any person whatever, quietly taken possession of his prey, it would be stretching the point too hardly against the captor, to say that on this account only it should be held an illegal capture. If nothing objectionable had appeared in the conduct of the captors before, the mere following to such a place as this is, would I think not invalidate a seizure otherwise just and lawful.¹

As has been pointed out,² Lord Stowell only gives the right a qualified approval. In the final result he decreed restitution of the ship on the ground that the captors had not exercised the right in the required manner, for they had stationed themselves in the mouth of a neutral river and used it as a base of operations.

Notwithstanding the decision in *The Anna*, the validity of Bynkershoek's original doctrine, which allowed a belligerent to pursue an enemy ship from the high seas into neutral waters and there capture it, was never free from doubt. Bynkershoek himself admitted that there was no authority for his statement, and this explains why Halleck called the right of hot pursuit in wartime 'a pretended exception of Bynkershoek' based entirely on the practices of the Dutch,³ and he promptly dismissed its lawfulness. He asserted that the practice of nations supports the view that all capture in neutral territory is unlawful. Earlier writers in the nineteenth century all took the view that Bynkershoek's exception was not valid, and that it in no way affected the general rule of the inviolability of neutral territory. Manning stated that the exception had never since been appealed to.⁴ Chancellor Kent cited Vattel and others to support his opinion 'that when the flying enemy has entered neutral territory, he is placed immediately under the protection of the neutral power . . . There is no exception to the rule that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful.'⁵ Wheaton explained why international law should not allow such a right of pursuit:

For how is an enemy to be pursued in a hostile manner within the jurisdiction of a friendly power, without imminent danger of injuring the subjects and property of the latter? *Dum fervet opus*—in the heat and animation excited against the fleeing foe, there is too much reason to presume that little regard will be paid to the consequences that may ensue to the neutral.⁶

Dana, Wheaton's editor, added in his commentary: 'The fact that a chase is pursued, *dum fervet opus*, into neutral territory does not justify a capture there.'⁷ However, he continued:

Violations of neutral waters by acts of war were almost the rule, rather than the exception, in the early wars and those arising out of the French Revolution. British cruisers seldom hesitated to continue their pursuit of any vessels into neutral territory, and even to complete their capture in neutral ports; and the cutting enemy's vessels out of neutral

¹ Ibid., p. 385.

² Glanville Williams, loc. cit. (above, p. 365 n. 4), p. 89.

³ Halleck, *International Law* (4th ed., 1908), vol. 2, pp. 168-9. His view is supported by Dupuis, *La guerre maritime* (1899), p. 423; Rolin, *Le Droit moderne de la guerre* (1921), vol. 1, p. 192; and Bluntschli, *Das Moderne Völkerrecht* (1878), Article 787.

⁴ Manning, *Law of Nations* (1839), p. 386.

⁵ Kent, *Commentaries on American Law* (10th ed., 1860), vol. 1, p. 129.

⁶ Wheaton, *Elements of International Law* (ed. Dana, 1866), p. 439.

⁷ Ibid., p. 439.

ports by boat expeditions was a common occurrence. In those days, it was rarely that a nation powerful enough to resent such an injury was not either an enemy or an ally of England.¹

He then cited examples of such violations.

The scope of the alleged unlawfulness of such pursuit and capture in neutral waters is not, however, entirely clear. Professor Glanville Williams has pointed out that it may be unlawful *vis-à-vis* the neutral but not necessarily as against the enemy. State practice on the latter, he says, is divided.² Similarly if hot pursuit is in fact lawful, any qualification of the rule requires clarification. Chancellor Kent explained the decision in *The Anna* on the grounds that the neutral territory concerned was uninhabited, and therefore the pursuit caused no interference with others. The pursuit itself was thus not illegal, but was still a violation of neutral territory for which the neutral power would have the right to insist on the restoration of the property seized.³

The only later writer to give any support at all to Bynkershoek's doctrine was Westlake who cited *The Anna* with approval as the counterpart of the doctrine that he was considering, i.e. the right of pursuit out of the territorial waters and onto the high seas. He also added, however, following Sir William Scott's dicta in *The Anna*, that a right of belligerent capture in territorial waters after pursuit from the high seas only applies 'on a part of the coast where no damage can be done, if the contest began or the summons to submit to search was made outside those waters, and there has been a hot continuous pursuit'. And he adds, of the right of hot pursuit from the high seas into territorial waters: 'Indeed the case is stronger, for the right of pursuit is not necessary to war, but is necessary to the effective administration of justice and to the secure enjoyment of fishery rights in time of peace.'⁴

In the uncertainty as to the existence of and limits to Bynkershoek's exception, it was Oppenheim who perhaps set the whole controversy in a historical perspective. During the eighteenth century the concept and rules of neutrality were in a nascent state, and although neutral territory was not to be violated by the belligerents there were many exceptions. One of these was Bynkershoek's rule that the enemy could pursue a defeated enemy fleet into neutral territorial waters.⁵ Speaking of the rules of neutrality as they stood at the turn of this century, Oppenheim commented: 'Stress must be laid on the fact that it is no longer legitimate for a belligerent to pursue military or naval forces who take refuge on neutral territory; should a belligerent, nevertheless, do this, he must, if possible, be repulsed by the neutral',⁶ and the neutral must exact reparation from the offender.⁷

A review of the authorities thus leads to the conclusion that no right exists of pursuit of an enemy ship into neutral waters and seizure there. The Institute of International Law, meeting in Heidelberg in 1879-80, had taken a similar view in its *Projet du règlement international des prises maritimes*, Article 8:

The right of seizure may not be exercised except in the waters of the belligerents and on the high seas; it may not be exercised in neutral waters, nor in waters which are

¹ Wheaton, op. cit. (above, p. 367 n. 6), p. 440.

² Loc. cit. (above, p. 365 n. 4), p. 90.

³ Kent, op. cit. (above, p. 367 n. 5), p. 129.

⁴ Westlake, op. cit. (above, p. 366 n. 3), vol. 1, p. 173.

⁵ Oppenheim, *International Law* (7th ed., by Lauterpacht, 1952), vol. 2, p. 627. Oppenheim's statement was originally made in the first edition of his work in 1906, p. 341, and has been consistently followed by all successive editors.

⁶ Ibid., p. 685.

⁷ Ibid., p. 756. Oppenheim's view is supported by Glanville Williams, loc. cit. (above, p. 365 n. 4), in his conclusions at p. 97.

expressly set aside from the theatre of war. The belligerent may not either pursue into these last two types of waters an attack which has already begun.¹

A similar article was drafted by the Institute of International Law meeting in The Hague in 1898, in their *Regime of Ships and their Crews in Foreign Ports*:

An attack begun on the high seas cannot be pursued into a neutral port or roadstead where a ship has taken refuge without a violation of the neutral territory, which must be restrained by the territorial powers, and may give the right to an indemnity.²

These views are also borne out by the practice of the United States and Great Britain in their municipal decisions, *The Adela*³ and *The Pellworm*,⁴ in both of which prize cases the Supreme Court and the Privy Council respectively held that neutral territory was absolutely inviolable. Modern writers are on the whole silent on the point, possibly assuming that the point is so free from doubt that it is not worth mentioning. There is support for this approach in the Hague Convention No. XIII concerning the *Rights and Duties of Neutral Powers in Naval War* (1907),⁵ which does not deal specifically with the question of pursuit, but states quite clearly that both neutral and belligerents have the duty to act impartially towards each other, and in particular that the belligerents are under a duty not to violate neutral territory for military or naval purposes of the war. Article 3 thus requires the neutral to release any prize within its jurisdiction which has been captured in its territorial waters. And Oppenheim adds that in so far as the neutral cannot 'undo the wrong done, he must exact reparation from the offender As regards the capture of enemy vessels in neutral waters . . . the neutral must claim the prize, and eventually damages, from the belligerent concerned, and must restore her to the other party.'⁶

II

Although the right of hot pursuit in wartime from the high seas to neutral territorial waters may have disappeared now from the body of international law, its existence in the nineteenth century could have been an influence on the development of what may be a quite separate doctrine, i.e. the right of hot pursuit in peacetime from territorial waters into the high seas. The question must therefore be asked: how did Bynkershoek's right of hot pursuit change from one operating in a time of war to a time of peace, and from one operating from the high seas to one operating from the territorial waters? It is doubtful whether there is any direct historical connection between the two doctrines. The circumstances in which they are invoked are quite different, and therefore the later doctrine can hardly be seen as an extension of the earlier. Thus Gidel says: 'La poursuite est une matière du droit maritime du temps de paix complètement distincte des opérations d'arraisonnement ou de police que les belligérants exercent en temps de guerre.'⁷ On the other hand, the same juridical basis, i.e. the effective continuation of the act of jurisdiction,⁸ clearly underlies both doctrines (as it does also the

¹ Institute of International Law, *Annuaire*, 12 (1892-4), p. 110.

² Draft Article 7, *ibid.* 17 (1898), p. 59.

³ 6. Wall. 266 (1867).

⁴ [1920] P. 347; [1922] 1 A.C. 292.

⁵ This Convention was never ratified by Great Britain, though accepted as stating the customary law.

⁶ Oppenheim, *op. cit.* (above, p. 368 n. 5), p. 756.

⁷ Gidel, *Le Droit international public de la mer* (1934), vol. 3, p. 339.

⁸ In terms of legal justification for the doctrine, the two most common reasons for allowing a right of hot pursuit as an exception to the freedom of the seas are that it is a continuation of an act of jurisdiction, and that it is necessary for the efficient exercise of territorial jurisdiction. See in general, Beck, *loc. cit.* (above, p. 365 n. 4), pp. 199-200.

common law doctrine of fresh pursuit) and provides a theoretical link to the principles. It is this link which is suggested by Beck when he says:

Another measure adopted in the paring down of the freedom of the seas was the turning of an old, rusty tool in the international jurist's kit to renewed usefulness in a new sphere, employing the old doctrine of pursuit *dum fervet opus* from the high seas into territorial waters, in dealing with pursuits of ships onto the high seas from the opposite direction.¹

Equally it is this theoretical though not historical continuity which has on other occasions been adverted to. Thus in *The North*² when a United States ship fishing in Canadian waters was pursued on to the high seas and captured, it was held by Martin J. at first instance that such pursuit onto the high seas of a ship infringing its laws in territorial waters was lawful,³ and in support he quoted with approval Richard Lee's book of 1803 which allowed pursuit in wartime into neutral territory. It is also referred to by Westlake when he says that the right of pursuit onto the high seas

... may be regarded as the counterpart of the doctrine, admitted by Lord Stowell following Bynkershoek, that a belligerent capture may be made in territorial waters on a part of the coast where no damage can be done if the contest began or the summons to submit to search was made outside those waters, and there has been a hot continuous pursuit. Indeed, the case is stronger, for the right of pursuit is not necessary to war, but is necessary to the effective administration of justice and to the secure enjoyment of fishery rights in time of peace.⁴

The argument here is that while the legal justification for the two doctrines is similar, the modern concept of hot pursuit has no affinity with Bynkershoek's original principle. The explanation of the right of hot pursuit as we know it today rather lies in the development in the eighteenth and nineteenth centuries of the concept of a maritime zone called territorial waters over which the coastal State had jurisdiction to enforce its own laws,⁵ and which was clearly a necessary concomitant of a right of hot pursuit. 'Hot pursuit is but a minor detail in national schemes for the extraterritorial projection of the effect of laws.'⁶ When the purpose of territorial security gave way in the nineteenth century to the enforcement of economic legislation by the coastal State, attempts were made, in particular by the United States, to enforce its trading laws even beyond the territorial waters and on to the high seas.⁷ In a series of cases in the early nineteenth

¹ Beck, *ibid.*, vol. 1, p. 91.

² [1905] 11 B.C.R. 473; *American Journal of International Law*, 2 (1908), p. 695.

³ Among other authorities, both Martin J. at first instance and the Supreme Court of Canada on appeal, in particular, were especially influenced by the views of the English writer Hall, *International Law* (4th ed., 1895), pp. 266-7.

⁴ Westlake, *op. cit.* (above, p. 366 n. 3), vol. 1, p. 173.

⁵ This development is discussed by many writers, but for a discussion in this particular context, see Beck, *loc. cit.* (above, p. 365 n. 4).

⁶ Beck, *ibid.*, p. 180.

⁷ The earliest legislation was the British Hovering Act, 1836, allowing enforcement of customs and revenue laws within twelve miles (i.e. four leagues) off the coast. Similar Acts were passed throughout the eighteenth and early part of the nineteenth centuries, but were later abandoned because they derogated from the freedom of the seas. The United States passed similar Acts from 1790 on, allowing enforcement within a similar twelve-mile limit. These extensions of jurisdiction beyond territorial waters have always been limited to the particular purposes claimed, e.g. smuggling, quarantine, customs, etc. (The States concerned have always objected to the right of visit of their ships on the high seas beyond the statutory limits, e.g. U.S. protests in 1859 and 1873, reported in Moore's *Arbitrations*, vol. 1, p. 904.) Here in State practice can be seen

century, the United States Supreme Court held that a State had the right to enforce its laws beyond the limits of its territory, thus allowing seizure on the high seas.¹ The conjunction of these two lines of thinking, i.e. the right to exercise jurisdiction over the territorial waters and the right to enforce laws against ships on the high seas, must in part have led to the theory that pursuit from the territorial waters to the high seas would justify a seizure on the high seas. In *The Marianna Flora*, Story J. makes this connection:

It has been held in the courts of this country, that American ships, offending against our laws, and foreign ships, in like manner, offending within our jurisdiction, may afterwards be pursued and seized upon the ocean, and rightfully brought into our ports for adjudication.²

It was, however, State claims in the nineteenth and especially the early twentieth century to enforce fishing laws within the territorial waters, and revenue and liquor laws beyond the territorial waters in zones of the high seas provided for by municipal

the historical origins of the concept of a contiguous zone, now embodied in the Geneva Convention on the Territorial Sea, Article 24, allowing jurisdiction for customs, fiscal, immigration and sanitary regulations. For detailed accounts of State claims to enforce their municipal laws beyond the territorial sea, see Beck, loc. cit. (above, p. 365 n. 4), pp. 99-105; Dickinson, 'Jurisdiction at the Maritime Frontier', *Harvard Law Review* (1926), p. 1; Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927); *American Journal of International Law* (1929), Supplement.

The attitude of writers to claims to enforce such laws by seizures beyond the three-mile limit have usually been negative. Piggott (*Nationality* (1907), Part 2) approves Chief Justice Marshall's opinion in *Church v. Hubbard*, 2 Cranch. 187 (1804): 'A nation has the right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right is an injury to itself which it may prevent and it has the right to use the means necessary for its prevention . . . If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.' Dana, supported by Phillimore (*International Law* (3rd ed., 1879)), recognizes the existence of the laws but doubts their validity: 'Doubtless States have made laws, for revenue purposes, touching acts done beyond territorial waters; but it will not be found, that, in later times, the right to make seizures beyond such waters has been insisted upon against the remonstrances of foreign States, or that a clear and unequivocal judicial precedent now stands sustaining such seizures, when the question of jurisdiction has been presented' (Wheaton, *International Law* (ed. Dana, 1866), p. 217). It is perhaps Woolsey who makes the only conclusion possible—that such seizures may be held legal by municipal law but illegal by international law (Woolsey, 'Municipal Seizures beyond the Three Mile Limit', *Foreign Relations of the United States* (1912), p. 1289 at p. 1297). Oppenheim, writing much later, takes Dana's point that seizures are allowed not by international law, but only through comity, and suggests that to be lawful seizure must be allowed by international agreement (Oppenheim, *International Law* (1955), vol. 1; p. 498).

¹ This is one view taken of the United States Supreme Court cases *Church v. Hubbard*, 2 Cranch. 187 (1804), and *Hudson v. Guestier*, 6 Cranch. 281 (1810) (which overruled *Rose v. Himely*, 4 Cranch. 241 (1808)). It is supported by Dickinson, loc. cit. (above, p. 370 n. 7). Later writers have explained the cases in terms of their own particular facts and the operations of municipal law rules, and doubt their authority for allowing municipal seizures beyond the three-mile limit. See Beck, loc. cit. (above, p. 365 n. 4), pp. 179-80; Dana's Wheaton, op. cit. (above, p. 370 n. 7), pp. 217-18; Woolsey, loc. cit. (above, p. 370 n. 7), pp. 1291-4, 1296; *American Journal of International Law* (1929), Supplement; Hershey, loc. cit. (above, p. 365 n. 2), pp. 567-8.

² *The Marianna Flora*, 11 Wheaton 1 at 42 (1826). This case is sometimes cited as a case of belligerency—see U.S. reply to International Law Commission questionnaire in *I.L.C. Yearbook* (1950); Woolsey, loc. cit. (above, p. 370 n. 7), p. 1297. The principle of adjudication and compensation is supported by Gidel, op. cit. (above, p. 369 n. 7), p. 347: 'C'est l'indispensable correctif du droit de poursuite.'

legislation or treaties,¹ that firmly established the doctrine of hot pursuit in international practice.²

The first international case often cited as a decision on the right of hot pursuit was *The Itata*.³ The United States claimed a breach of its neutrality by a ship of the provisional government opposing the established Government of Chile. The *Itata* was followed out of a United States port by two U.S. cruisers into Chilean waters and brought back to the United States under force. The United States' action was held unlawful by the U.S.-Chile Claims Commission. The case is usually cited as establishing the rule that pursuit must cease when the pursued ship enters the territorial waters of its own or of a third country.⁴ The rule is clearly in keeping with the principles of territorial sovereignty and is totally unexceptionable. The case was not, however, dealt with by the arbitrators as an issue of hot pursuit, but rather as a question of seizure in foreign territory; and there is no discussion or acceptance of any doctrine of pursuit. To the contrary, the arbitrators quoted David Dudley Field's International Code, s. 626: 'An inmate of a foreign ship who commits an infraction of the criminal law of a nation within its territory cannot be pursued beyond its territory into any part of the high seas.' Further, as has been pointed out, it is even dubious whether the facts of the case would or should have allowed a right of hot pursuit.⁵ In view of all this, and the fact that the issue arose in the context of belligerency and neutrality, quite different from the normal situation where hot pursuit is invoked, the case is not a very valuable precedent in establishing the right of hot pursuit in international law.

A year later, in the *Behring Sea* arbitration,⁶ the right of hot pursuit was raised as an issue, though it did not arise on the particular facts of the case. The United States claimed the right to prevent fur seal hunting in the Behring Sea on the grounds of self-defence or self-preservation. It was argued that the freedom of the seas was subject to the right to do on the high seas whatever was necessary to protect its property or interests. Another exception cited as an analogy was the right of hot pursuit onto the high seas. The British argued that the right of self-defence could not be applied to premeditated action, such as the United States was committing by seizing any sealing schooners found hunting in the Behring Sea, since it only arose from overwhelming necessity where there was no time for deliberation. Sir Charles Russell, Attorney-General, contended for Great Britain that the right of hot pursuit was no exception to

¹ These claims have been fully traced and discussed in Masterson, *Jurisdiction in Marginal Seas* (1929); Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927); Dickinson, 'Jurisdiction at the Maritime Frontier', *Harvard Law Review* (1926), p. 1; Harvard Research in International Law, in *American Journal of International Law* (1929), Supplement.

² These claims also accounted for the analogous doctrine of constructive presence, whereby a ship was held to be within territorial waters, though on the high seas itself, if its small boats were operating within the territorial waters. The legality of seizing the mother ship was upheld by many United States cases, e.g. *The Araunah*, Moore's *Arbitrations* (1888), vol. 1, p. 824; *The Tenyu Maru* (1910), 4 Alaska Reports 129; *The Grace and Ruby* (1922), 283 Fed. 475; *The Henry L. Marshall* (1923), 292 Fed. 486. It was doubted in *The Marjorie Bachman* (1925), 4 Fed. (2nd) 405. For discussion of these cases see Beck, loc. cit. (above, p. 365 n. 4), pp. 261-4; Hughes, *American Journal of International Law*, 18 (1924), p. 232; Masterson, op. cit. (n. 1 on this page), pp. 308-12; Jessup, op. cit. (n. 1 on this page), pp. 247-53. The doctrine has been embodied in the right of hot pursuit in Article 23 of the Geneva Convention on the High Seas, 1958, so that the mother ship may be pursued as if she herself had been in the territorial waters.

³ *The Itata*, Moore's *Arbitrations* (1892), vol. 3, p. 3067.

⁴ Beck, loc. cit. (above, p. 365 n. 4), p. 269. For a similar municipal decision see *The Apollon* (1824), 9 Wheat. 362.

⁵ Beck, *ibid.*, pp. 269-70.

⁶ *The Behring Sea, Fur Seal* arbitration, Moore's *Arbitrations* (1893), vol. 1, p. 755.

the rule that territorial jurisdiction could not be exercised on the high seas. He talked of hot pursuit as existing only 'by consent by acquiescence', 'not a strict right of international law, but . . . something which nations will stand by and see done, and not interpose if they think that the particular person has been endeavouring to commit a fraud against the laws of a friendly power'.¹ The arbitrators dismissed the United States claim to exercise the alleged territorial jurisdiction over the high seas, but no decision was given nor was it necessary on the facts, on whether there existed a customary rule allowing hot pursuit, as an exception to the general rule of the freedom of the high seas. The case thus illustrates the nature of State claims to the right of pursuit, but hardly provides an authoritative decision on the question.

The clearest international judicial statement on the right of hot pursuit appeared in an arbitration in 1900 between the United States and Russia concerning two United States ships, the *James Hamilton Lewis* and the *C. H. White*.² Russian cruisers had pursued and seized the two ships on the high seas and charged them with illegally engaging in fur seal fishing in Russian territorial waters. Despite certain doubts as to whether the United States ships had been fishing actually inside Russian waters (and this in turn depended on how far territorial waters could be held to extend), the Dutch arbitrator Asser was quite clear that international law knew no right of pursuit onto the high seas and seizure there:

The contention that a ship of war might pursue outside territorial waters a vessel whose crew had committed an unlawful act in territorial waters or on the territory of a State, was not in conformity with the law of nations, since the jurisdiction of the State could not be extended beyond the territorial sea, unless by express convention.

Thus the only international case actually to turn on the question of hot pursuit denied such a right in customary law, though it allowed the restriction on the freedom of the seas if contained in a treaty. The case was not, however, received without criticism. Westlake commented: 'We cannot but think that our learned friend's judgment in this particular showed an excess of caution.'³

The only other case in this century in which the right of hot pursuit has been disputed was *The I'm Alone*.⁴ The *I'm Alone*, a Canadian vessel engaged in smuggling liquor into the United States, was sighted within one hour's sailing time from the United States⁵ and ordered to stop by the coastguard cutter, the *Wolcott*. On refusing to stop or allow herself to be boarded when summoned to do so within the conventional limit, the *I'm Alone* was pursued by the *Wolcott* into the high seas. Still in hot pursuit, the *Wolcott* called upon another revenue cutter for assistance, and 200 miles off the United States coast, the *Dexter* joined the pursuit and finally sank the *I'm Alone*. The Commissioners set up under the Anglo-American Treaty of 1924 to decide disputes were presented by the Canadian Government with four claims: that the doctrine of hot pursuit 'has not found complete acceptance'; that 'where recognised, it is under the

¹ For a criticism of Sir Charles Russell's view of what amounts to a customary rule, see Dennis, *American Journal of International Law*, 29 (1935).

² *The James Hamilton Lewis, The C. H. White*, Moore's *Arbitrations* (1902), vol. 1, p. 927.

³ Westlake, *op. cit.* (above, p. 366 n. 3), vol. 1, p. 174. Colombos (*International Law of the Sea* (6th ed.), p. 169) says: 'The arbitrator later declared that he agreed with the doctrine of hot pursuit adopted by the Institute of International Law in 1894, and that the sentence quoted from his award should not be otherwise understood.' The only possible explanations of this comment are either that Asser found on the facts that the pursuit had not in fact commenced in Russian territorial waters, or that he changed his views on the right of hot pursuit under pressure.

⁴ *The I'm Alone*, *R.I.A.A.* 3 (1933-5), p. 1609.

⁵ This was the conventional limit for the enforcement of U.S. prohibition laws, agreed upon by the Anglo-American Liquor Treaty, 1924.

distinct limitation that the pursuit must be initiated within the territorial waters' and may not properly be commenced within the treaty limit of one hour's sailing; that the pursuit was neither hot nor continuous because the *Wolcott* was substituted by the *Dexter*; and finally that the right of pursuit could not permit the sinking of the *I'm Alone*. The United States, on the other hand, contended that its municipal courts had often found pursuit from a statutory limit of twelve miles to be lawful,¹ and that no protests had been made by the British or Canadian Governments against the enforcement of the doctrine of hot pursuit in these cases. Furthermore they argued that the *Wolcott* and *Dexter* were operating at all times as one unit and under one command, and that the sinking was made inevitable and therefore lawful by the *I'm Alone*'s repeated refusal to surrender.²

The Commissioners presented an Interim Report in 1933, in which they gave three answers. First, they said that they considered themselves entitled to consider the beneficial ownership of the *I'm Alone* (which it was claimed was American), since this might affect the final determination; secondly, that they had not yet agreed, nor disagreed, on the question of whether the right of hot pursuit could operate from the treaty limit; and thirdly, assuming that the right of hot pursuit existed and that the *Dexter* was entitled to join in the pursuit begun by the *Wolcott*, that whereas the United States could use 'necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel', the sinking was not incidental to the use of such force, but admittedly intentional and therefore unlawful. In their Final Report in 1935, the Commissioners decided first that since the ship was *de facto* owned, controlled and managed almost entirely by United States citizens, 'no compensation ought to be paid in respect of the loss of the ship or the cargo'. Secondly, they decided that because the sinking was unlawful, the 'United States ought formally to acknowledge its illegality, and apologise to H.M.'s Canadian Government therefor', and to pay a sum of money as damages.

The significant matter here is that the Commissioners did not actually make a statement in either Report on the right of hot pursuit. Commentators such as Dennis,³ Hyde,⁴ and Garner⁵ have, however, tried to argue that the answer to the question on the sinking can only be explained on the assumption of a positive answer to the question of hot pursuit, i.e. that a right of hot pursuit existed, and that it operated from the treaty limit as the United States claimed. On the other hand, Fitzmaurice⁶ takes the view that it was significant that the Commissioners could not agree on the question of the right of hot pursuit, implying that too much doubt existed to make a pronouncement on it. He points out that it was only for the purpose of deciding on the legality of the sinking that they needed to assume that the United States had the right of pursuit. For if the right did not exist then the pursuit and the subsequent sinking would have been illegal. However, the Commissioners agreed that the sinking was in any case unlawful as amounting to unnecessary force, wherever the *I'm Alone* was when sighted and even if the subsequent pursuit was justified. Their silence on the question

¹ See *The Vines*, *The Newton Bay*, and *The Pescawha*, below, p. 376.

² For a full statement of the U.S. claim, see communication of 17 April 1929, from the U.S. Secretary of State to the Canadian Minister in Washington, quoted in Garner, this *Year Book* 16 (1935), p. 174.

³ Dennis, 'The Sinking of the *I'm Alone*', *American Journal of International Law*, 23 (1929), p. 351. Dennis also takes the view that the sinking constituted necessary force in the circumstances.

⁴ Hyde, 'The Adjustment of the *I'm Alone* case', *ibid.* 29 (1935), p. 296.

⁵ Garner, *loc. cit.* (n. 2 on this page).

⁶ Fitzmaurice, 'The Case of the *I'm Alone*', this *Year Book*, 17 (1936), p. 82.

of pursuit was thus deliberate. Fitzmaurice then argues that in fact it would be quite wrong to allow hot pursuit from conventional waters and thus assimilate what is actually part of the high seas with territorial waters over which the State has sovereignty.¹

The fact that the Commissioners did not make a reasoned decision about the right of hot pursuit, and the resulting ambiguity about its existence or nature, make the *I'm Alone* of limited value as evidence of a customary rule of international law allowing a right of hot pursuit whether from territorial waters or from treaty waters.

Since the *I'm Alone* there have been no international cases in which the existence of the right of hot pursuit has been challenged.² The international judicial position is therefore hardly established. It was, however, in the practice of States that the right became firmly accepted.³

British practice from an early date had consistently upheld a right of pursuit of a ship which had committed an offence in territorial waters. In 1841 the British Government admitted that the Spanish authorities had the right to pursue onto the high seas a Gibraltar vessel carrying contraband within Spanish territorial waters.⁴ This same position as regards pursuit and seizure on the high seas was taken in the opinions of the Law Officers in 1852 concerning British ships pursued by French cruisers, in 1891, by Chilean authorities, in 1892 and 1893 *vis-à-vis* the Russian Government and in 1899 by Danish authorities.⁵

This consistent practice is evident in the decision in *The North*.⁶ A Canadian ship pursued the *North*, a United States ship, out of Canadian waters, in which it had been illegally fishing, on to the high seas and there captured it. The fact that the U.S. disputed the right to pursue is itself indicative of the still uneasy position of the doctrine. Both at first instance and on appeal to the Supreme Court of Canada, the right of hot pursuit from territorial waters to the high seas was categorically upheld. The same position was taken, though *obiter*, in a U.S. case, *The Tenyu Maru*.⁷ The right of hot pursuit, however, finally came into its own through a series of cases arising out of the United States Tariff Act, 1922 (which attempted to prevent illegal importation of liquor into the United States, and allowed the right of search and seizure and pursuit of any suspected ships within twelve miles off the U.S. coast),⁸ and the Anglo-American

¹ This view is in line with his later views on the issue of hot pursuit from the contiguous zone. See further, below, p. 380 n. 2.

² In the *Hackness* incident between the U.K. and Iceland in 1958 (*International and Comparative Law Quarterly*, 8 (1959), p. 177) the right of hot pursuit from territorial waters was not disputed by either party. The argument turned on how far Iceland's fishing waters could extend. For a Peruvian claim to exercise the right of hot pursuit from a 200-mile territorial water see *In Re Sanger, Droit maritime français* (1955), p. 63; Colombos, *op. cit.* (above, p. 373 n. 3), p. 98.

³ For municipal decisions applying the doctrine of hot pursuit to ships of the nationality of the pursuing State, see *The Rosalie M.* (1925), 4 Fed. 815; *The Homestead* (1925), 7 Fed. 413; *Mason v. R.*, *Annual Digest*, 1935-37, Case No. 111.

⁴ Smith, *Great Britain and the Law of Nations* (1935), vol. 2, p. 250.

⁵ McNair, *International Law Opinions* (1956), vol. 1, pp. 253-5.

⁶ [1905] 11 B.C.R. 473. The case has been cited with approval in numerous other cases, e.g. *The Homestead* (1925), 7 Fed. 413, *U.S. v. Ford* (1925), 3 Fed. 643, *Fudge v. R.*, [1940] Can. Exch. 187, cited in Whiteman's *Digest of International Law*, vol. 4, p. 686.

⁷ *Alaska Reports*, 4 (1910), p. 129.

⁸ The Tariff Act, 1922, section 581, reads: '... Officers of the Department of Commerce ... may go on board of any vessel at any place within the United States or within four leagues of the coast of the United States and hail, stop and board such vessels in the enforcement of the navigation laws and arrest, or in the case of escape or attempted escape, pursue and arrest any person engaged in the breach or violation of the navigation laws.' A similar Russian provision was contained in the Statute for the Protection of the Frontiers of the U.S.S.R., Article 27: 'The pursuit of a vessel which has not conformed to a summons by the authorities charged with

Treaty of 1924 (which allowed the right of search and seizure of British vessels suspected of importing liquor into United States ports without seal, within one hour's sailing distance off the U.S. coast). The cases all raise the question whether the right of hot pursuit can be exercised from the statutory twelve mile limit or from the treaty's one hour's sailing limit. In *The Vincennes*¹ a British ship was pursued by a United States coastguard cutter from a point outside territorial waters but within the statutory limit and/or treaty limit, and captured on the high seas beyond both limits. The case turned on whether the right of hot pursuit, which was explicitly allowed from the twelve-mile limit by the Tariff Act, could apply in a situation governed by the terms of the treaty between the United States and Great Britain, and which explicitly stated that 'the right (of search and seizure) . . . shall not be exercised at a greater distance from the coast of the United States . . . than can be traversed in one hour'.² It was held that the treaty could not abrogate the clear terms of the statute, and that therefore the treaty was to be construed as including the right of hot pursuit on the grounds of effective interpretation.³ This last point was not, however, necessary to the decision since it was accepted that the ship was actually within the twelve-mile limit when signalled, so that any pursuit beyond the limit was justified under the statute. In the same year a Canadian ship, the *Newton Bay*, was pursued by a United States coastguard cutter from a point about eight and a quarter miles off U.S. territory to thirteen miles offshore. The seizure was held lawful because the pursuit had begun within the twelve-mile limit.⁴ The same decision on similar facts was made in *The Pescawha*⁵ and *The Resolution*⁶ in 1929. This extension to a customs zone of the right of hot pursuit exercisable from territorial waters was adopted by other States. In *The Katina*⁷ the Egyptian Court of Appeal upheld the right of the Egyptian Government to pursue a ship suspected of carrying contraband (narcotics) from the Egyptian customs zone of twelve miles onto the high seas.⁸

In France, practice as to the right of pursuit has been less clear. The *Tribunal Correctionnel de Bastia* decided that the pursuit by French authorities of an Italian trawler fishing in French territorial waters onto the high seas and subsequent seizure there was lawful according to international law.⁹ However, the only municipal case in the protection of the coasts within the limits of the territorial sea may be continued beyond these limits onto the high seas . . . ' (reported in *I.L.C. Yearbook* (1950), p. 36).

¹ (1927), 20 Fed. 164, and on appeal *Gillam v. U.S.* (1928), 27 Fed. 296.

² 43 Stats. 1761, Article II (3).

³ This point in the decision was approved by Uren in *Michigan Law Review* (1928), p. 551, though he admits that the case does not conclusively hold on either ground. It is criticized by Beck, loc. cit. (above, p. 365 n. 4), p. 358, who claims at p. 193 that comments in *The Resolution* (1929), 30 Fed. 534, support his opinion.

⁴ (1928), 30 Fed. 444.

⁵ (1928), *Annual Digest*, 1929-30, Case 86 (District Court of Oregon).

⁶ (1929), 30 Fed. 534, *ibid.*, Case 87 (District Court of Louisiana). This consistent United States position upholding a right of pursuit was stated and explained by Secretary Hughes in 1924 in an address to the Council on Foreign Relations (in *American Journal of International Law*, 18 (1924), pp. 231-2), and by the Solicitor for the Department of State (in Hackworth, *Digest of International Law* (1941), vol. 2, pp. 702-3).

⁷ *Annual Digest*, 1929-30, Case 89 (Egyptian Court of Appeal).

⁸ While these cases clearly establish a right of hot pursuit, the issue of whether it can be exercised from a customs zone has reappeared in the arguments concerning the right of hot pursuit from the contiguous zone. The principle was adopted by the Institute of International Law meeting in Stockholm in 1928, in its *Projet de règlement relatif à la mer territoriale en temps de paix*, Article 13, and in Article 23 of the Geneva Convention on the High Seas, 1958. See further below, p. 380 n. 2.

⁹ (1931). Cited in Kiss, *Répertoire français de droit international public* (1962), vol. 4, p. 151. See also cases mentioned by Massin, *La Poursuite en droit maritime* (1937).

which the right of hot pursuit has been denied as a customary rule of international law is the French decision in *The Ernest and Prosper Everaert (II)*.¹ As a consequence of illegal fishing, a French customs patrol vessel had pursued a Belgian fishing vessel on to the high seas from French territorial waters. The issue raised was whether a right of hot pursuit could be allowed to the French in view of the fact that the North Sea Fisheries Convention of 1882, to which both States were parties, did not mention any right of hot pursuit and imposed many restrictions on the right of control and visit of other ships on the high seas. It was held that:

In the face of this Convention, the extension of the right of pursuit onto the high seas would entail the risk of confusion between the rights of the pursuing ship and those of vessels entrusted by the treaty with the work of control over fishing on the high seas. Such an exception to the principle of freedom of the high seas cannot be accepted by the court in the absence of evidence which is lacking in this case.

The suggestion is that the right of hot pursuit can only be allowed if it is conventional, a view which was perhaps justified since the Final Act of the Conference for the Codification of International Law at The Hague in 1930, allowed a right of hot pursuit, but the Act was ignored in this case because neither State involved had ratified it.² At this time various other treaties had also specifically included the right of hot pursuit, no doubt to ensure that there would be no question as to its existence or validity, e.g. the Convention of Commerce and Navigation between France and Egypt, Article 20, 1902,³ the Helsingfors Convention of 1925 for the suppression of contraband traffic in liquor between Finland and the other Baltic Sea States,⁴ and the Anglo-Finnish Treaty of 1933.⁵

III

The confusion in judicial decisions and State practice as to the existence of a customary rule of international law allowing hot pursuit onto and seizure on the high seas is reflected in the writings of international lawyers of the time. Many of the earlier writers took the view that attempts by States to seize ships on the high seas for infractions of their municipal laws were unlawful. Thus Dana says:

It may be said that the principle is settled, that municipal seizures cannot be made, for any purpose, beyond territorial waters. . . . Doubtless States have made laws, for revenue purposes, touching acts done beyond territorial waters; but it will not be found, that, in later times, the right to make seizures beyond such waters has been insisted upon against the remonstrance of foreign States, or that a clear and unequivocal judicial precedent now stands sustaining such seizures, when the question of jurisdiction has been presented.⁶

Similar views were stated by Phillimore⁷ and Twiss.⁸ It is of course important to note that they were not specifically talking about a right of hot pursuit, but rather about

¹ *Annual Digest*, 1935-37, Case 112 (Tribunal correctionnel de Dunkerque). This case has been criticized by Gidel in *Revue critique de droit international* (1936), pp. 753-5, and by Massin, *op. cit.* (in the preceding note).

² See below, p. 380 n. 1.

³ Referred to in Kiss, *op. cit.* (above, p. 376 n. 9), p. 151.

⁴ Article 9, in *League of Nations Treaties*, vol. 42, p. 73.

⁵ Referred to in Colombos, *op. cit.* (above, p. 373 n. 3), p. 172.

⁶ Wheaton, *op. cit.* (above, p. 367 n. 6), pp. 217-18.

⁷ Phillimore, *op. cit.* (above, p. 370 n. 7), p. 276.

⁸ Twiss, *Law of Nations* (1892), p. 309.

seizures beyond the territorial waters. Later writers such as John Bassett Moore,¹ Asser² and Fedozzi³ have specifically denied a right of hot pursuit. Other writers while accepting the right found it difficult to explain against the freedom of the high seas. Westlake talks of the right of pursuit as a 'perhaps doubtful exception' to the exclusive authority of the State of the flag in the open sea.⁴ Piggott accepts that the doctrine is found in both State practice and judicial opinion but hedges it with many detailed rules for its exercise. He thought that there were few real examples of its use because it was an extraordinary remedy.⁵ Testa mentions his doubts, but allows the right of hot pursuit as a 'legitimate principle though contested by some'.⁶

On the other side, from as early as 1874, many writers were convinced of the legality of the right of hot pursuit as an exception to the freedom of the seas. They include Woolsey,⁷ Bluntschli,⁸ Perels,⁹ Hall,¹⁰ Calvo,¹¹ Rivier,¹² Pitt Cobbett,¹³ Travers,¹⁴ Pitman Potter,¹⁵ Jessup,¹⁶ Gidel,¹⁷ Massin¹⁸ and others.¹⁹

By the early twentieth century, one can say that the doctrine was accepted in almost all new legal treatises. The impetus for this opinion came no doubt from attempts which had been made as early as 1888 to consider the right of hot pursuit with a view to codification. The Institute of International Law meeting in Lausanne in 1888 to discuss the Definition and Regime of the Territorial Sea, first raised the question of pursuit. Their meeting in Paris in 1894 adopted Article 8:

. . . The coastal State has the right to continue on the high sea the pursuit commenced in the territorial sea, to stop and to adjudicate on the ship which has committed an offence within the limits of its waters . . .²⁰

The rationale given for such a right was that it was necessary for the suppression of contrabanders and for the effective enforcement of customs and fishing laws. The United States representative, J. B. Moore, was opposed to allowing the right. He thought that no general right of pursuit existed except in the case of pursuing smugglers when jurisdiction could be exercised beyond the three-mile limit. In 1898 at their meeting in The Hague, the Institute of International Law adopted a more detailed draft article as part of their Regime of Ships and their Crews in Foreign Ports, which authorized pursuit on the high sea when a ship was fleeing to save its crew from acts

¹ At the meeting of the Institute of International Law in 1894 in Paris; see this page.

² See his opinion in the *James Hamilton Lewis* and the *C. H. White*, above, p. 373 n. 3.

³ *Recueil des cours*, 10 (1925), p. 80.

⁴ Westlake, op. cit. (above, p. 366 n. 3), p. 173.

⁵ Piggott, op. cit. (above, p. 365 n. 4), pp. 38-9. The same opinion is expressed by Hyde, *International Law* (2nd ed., 1922), vol. 1, p. 794.

⁶ Testa, *Le Droit public international maritime* (1886), p. 73. Similarly Hershey, loc. cit. (above, p. 365 n. 2), at p. 568.

⁷ Woolsey, *International Law* (1874), 3rd ed., p. 80.

⁸ Bluntschli, op. cit. (above, p. 367 n. 3), Article 342.

⁹ Perels, *Manuel de droit maritime international* (1883), pp. 70-1.

¹⁰ Hall, *A Treatise on International Law* (4th ed., 1895), p. 266.

¹¹ Calvo, *Le Droit international* (5th ed., 1896), vol. 1, p. 567.

¹² Rivier, *Principes* (1896), vol. 1, p. 151.

¹³ Pitt Cobbett, *Cases and Opinions on International Law* (3rd ed., 1909), p. 169.

¹⁴ Travers, *Le Droit penal international* (1921), vol. 3, p. 246.

¹⁵ Pitman Potter, *The Freedom of the Seas* (1924), p. 103.

¹⁶ Jessup, op. cit. (above, p. 370 n. 7), pp. 106-12.

¹⁷ Gidel, *Le Droit international public de la mer*, vol. 3 (1934), pp. 339 et seq., especially p. 345.

¹⁸ Massin, op. cit. (above, p. 376 n. 9), *passim*.

¹⁹ See other writers mentioned in the Report by François on the Regime of the High Seas in *I.L.C. Yearbook* (1950), p. 36, and by Gidel, op. cit. (above, p. 369 n. 7), pp. 340, 343.

²⁰ Institute of International Law, *Annuaire*, 13 (1894), p. 33.

directed against them by reason of offences committed in a port.¹ The article was adopted again by the Institute in Stockholm in 1928 with minor amendments.² An article similar to that of 1894 was adopted by the International Law Association at its meeting in Vienna in 1926 to consider The Laws of Maritime Jurisdiction in Time of Peace.³ In the same year, 1926, the League of Nations Committee of Experts for the Progressive Codification of International Law, after having sent a questionnaire to States on the topic, drew up Article 10 of a draft convention on the territorial waters:

... The riparian State shall have the right to continue on the high seas the pursuit of a vessel commenced within its territorial waters and to arrest and to bring before its courts a vessel which has committed an offence within its territorial waters. If, however, the vessel is captured on the high seas the State whose flag it flies shall be notified immediately ...⁴

The American Institute of International Law, meeting in Rio de Janeiro in 1927, adopted a similar article: 'This Republic has the right to continue in the zone contiguous to its territorial sea the pursuit of a ship which began in its territorial waters and to bring the ship before its tribunals.'⁵ Harvard Law School in its *Research in International Law* on the subject of territorial waters published in 1929, thought that there was 'considerable authority' for its Article 21: 'A State may continue on the high sea the pursuit of a vessel of another State and may affect its arrest for a violation of its law, if such pursuit was begun while the vessel was in the territorial waters of that State.'⁶ It also thought that a special maritime zone beyond the territorial waters was justified: 'The navigation of the high sea is free to all States. On the high sea adjacent to the marginal sea, however, a State may take such measures as may be necessary for the enforcement within its territory or territorial waters of its customs, navigation, sanitary, or police laws or regulations, or for its immediate protection.'⁷

The culmination of this activity was the 1930 Hague Conference for the Codification of International Law. The views of some fifty States present were sought, and with one exception, they all recognized the existence of a right of pursuit from territorial waters to the high seas. Article 11 of the Final Act of the Conference on the Legal Status of the Territorial Sea states:

The pursuit of a foreign vessel for an infringement of the laws and regulations of a coastal State begun when the foreign vessel is within inland waters or the territorial sea of the State, may be continued outside the territorial sea so long as the pursuit has not been interrupted. The right of pursuit ceases as soon as the vessel which is pursued enters the territorial sea of its own country or of a third State ... A capture on the high seas shall be notified without delay to the State whose flag the captured vessel flies.⁸

¹ Ibid. 17 (1898), p. 273.

² Institute of International Law, 'Projet de reglement relatif a la mer territoriale en temps de paix', Article 13, in *ibid.* (1928), p. 759.

³ Article 12. In International Law Association, *Report of 34th Conference* (1926), p. 103.

⁴ 'Publications of the League of Nations V (1926), Legal Questions V, 10', in *American Journal of International Law* (1926), Supplement, p. 47.

⁵ American Institute of International Law (1927), Project No. 12, *Jurisdiction*, Article 10 (2).

⁶ *American Journal of International Law* (1929), Supplement, p. 358.

⁷ Ibid., p. 333, Article 20. The concept of a contiguous zone was an obvious outcome of State claims to enforce customs and revenue laws beyond the territorial waters. It was recognized in the International Law Association plan of 1924, Article 12, the Institute of International Law at Stockholm in 1928, Article 13, the League of Nations Committee of Experts Draft Convention on Territorial Waters, Article 2 (in *American Journal of International Law* (1926), Supplement), and was finally accepted in the Geneva Convention on the Territorial Sea Article 24 (1958).

⁸ League of Nations Acts of the Conference for the Codification of International Law (1953), reported *ibid.* (1930), Supplement, p. 186.

At the same time the concept of a contiguous zone was mooted but gained insufficient support.¹ The Final Act of the 1930 Hague Codification Conference was, however, never ratified, and it was not until the International Law Commission *Report on the Regime of the High Seas*, begun in 1950, became part of the 1958 Geneva Conventions on the Law of the Sea, that the right of hot pursuit was finally accepted as part of international law. In 1950 the International Law Commission sent out another questionnaire to governments asking for their views, and discussions on the exact details of the right were examined at length in 1950, 1956 and 1958. These included in particular discussions on whether hot pursuit could start in a contiguous zone rather than in territorial waters,² and whether hot pursuit could be begun against a mother ship where it had only a constructive presence (by the use of small craft) in the territorial waters. Both these questions were answered in the affirmative in the 1951 proposed article³ (which became Article 22 of the 1956 Draft Convention),⁴ and became law by virtue of Article 23 of the Geneva Convention on the High Seas.

VI

Despite the fact that the Geneva Convention on the High Seas, Article 23 of which now contains the statement of the current right of hot pursuit, is said in its preamble to be 'generally declaratory of established principles of international law', it is hard to contend that the right of hot pursuit either in principle or in its detailed application had been clearly accepted as a customary rule before the 1930 Hague Codification Conference. What is evident from the history of the right of hot pursuit is that it really has no historical links with Bynkershoek's right of belligerents to pursue their enemy's ships into neutral waters, and that the origins of the doctrine must be seen rather in the practice of Great Britain and the United States starting from the beginning of the nineteenth century.

At least in the nineteenth and early twentieth centuries the freedom of the seas was regarded as so important a principle that State claims to enforce municipal laws beyond their territorial waters by allowing pursuit on to the high seas took over a hundred years to become accepted as part of international law by virtue of the necessary *opinio juris*. The uncertain and in many ways unsatisfactory nature of custom as a source of law is amply documented. The doctrine of hot pursuit was said to be a necessary exception to the freedom of the seas in order that territorial jurisdiction could be effectively exercised and to avoid violations of local laws with impunity. Yet the restrictions on the exercise of the right, for example that it had to be begun *dum fervet opus*, at the same time ensured support for the concept of the freedom of the seas. The doubted existence of the doctrine illustrates the fears that the freedom of the seas would be whittled away. Even after the concept of the freedom of the seas became firmly estab-

¹ League of Nations Acts of the Conference for the Codification of International Law (1953), reported *ibid.* (1930), Supplement p. 234.

² This concept was not accepted by either the United Kingdom or the Netherlands. The British view was that the contiguous zone was quite different from the territorial sea in terms of the State's jurisdiction over it, and that therefore hot pursuit could not start within it. This is ably argued by Fitzmaurice, the U.K. representative at the International Law Commission and at the Geneva Conference, in *I.L.C. Yearbook* (1956), p. 82; 'Maritime Law—effects of the Norwegian Fisheries case on substantive maritime law', this *Year Book*, 31 (1954), p. 371, at p. 380; 'Some Results of the Geneva Conference on the Law of the Sea', *International and Comparative Law Quarterly*, 8 (1959), p. 73, at p. 108. For a criticism of Fitzmaurice's standpoint, see McDougall and Burke, *The Public Order of the Oceans* (1962), p. 893.

³ *I.L.C. Yearbook* (1951), 2nd Report by François on the Regime of the High Seas.

⁴ *Ibid.* (1956), p. 13 (replies from governments on the draft convention on the high seas).

lished by the end of the seventeenth century, alternative doctrines evolved to safeguard and protect the interests of coastal States. The first and most important of these was clearly the idea of territorial waters over which the coastal State had sovereignty; lesser doctrines to become established as exceptions to the complete freedom of the seas were the concept of a contiguous zone for revenue, customs, police and quarantine jurisdiction, and the closely related concept of hot pursuit from either of these two jurisdictional zones on to the high seas. It would appear that as States' interests change, so do the claims for the greater use of the seas.

The question for the future is whether the 'old, rusty tool in the international lawyer's kit' will be put to renewed usefulness once again. The immediate problem is whether the freedom of the seas will give way to coastal States' claims to new internationally recognized maritime zones, such as fishing zones, pollution control zones, or general economic zones (including sea-bed rights), and whether the right of hot pursuit, which is now so firmly part of international law, will be regarded as a necessary concomitant of such zones on the grounds of the effective enforcement of the new jurisdictions.¹ The arguments in the past for acceptance of a right of hot pursuit from the contiguous zone would certainly support the extension of the right to other maritime jurisdictions, though placing the concept of the freedom of the seas in further danger.² It is worth remembering that it was concern for the freedom of the seas which for almost a century prevented hot pursuit from becoming a clearly recognized international right.

¹ The already mooted extension of the doctrine to aircraft pursuing other aircraft out of the airspace above territorial waters to the airspace above the open seas does not raise any new juridical problems. The rationale of hot pursuit on the sea, in that it does not infringe upon the territorial sovereignty of any other State, can apply equally to the air. See, e.g., Beck, *op. cit.* (above, p. 365 n. 4), pp. 363-4.

² These are among the issues to be discussed at the forthcoming international conference on the law of the sea, discussed in part by Bowett, 'Deep Sea-bed Resources: A Major Challenge', [1972] *Cambridge Law Journal*, p. 50.

THE I.L.O. CONVENTION ON INDIGENOUS AND TRIBAL POPULATIONS—THE RESOLUTION OF A PROBLEM OF *VIRES**

By GORDON I. BENNETT

The adoption in 1957 of the International Labour Organization's Convention on Indigenous and Tribal Populations¹ offers one of those instances, comparatively rare in international law, in which the constitutional competence of an international organization to promulgate a proposed instrument has been the subject of extensive debate within the organization itself. As such it is of interest for the light it casts—affected by the tripartite structure of the International Labour Organization—on that peculiar amalgam of legal argument and political expediency which is apt to characterize the approach of non-judicial bodies to problems of *vires*.

The proposed convention represented the culmination of thirty years' work by the I.L.O. and other specialized agencies, undertaken with a view to giving practical help and technical assistance to countries containing indigenous populations, whose backward social, economic and cultural conditions impede their integration into the national society, and prevent them from benefiting from the rights and advantages enjoyed by other elements of the population.² The text of the instrument, however, was based largely on the conclusions formulated by the I.L.O. Committee on Indigenous Populations,³ in response to a request from the Governing Body to prepare a body of draft principles on 'the living and working conditions of indigenous peoples', and it was the alleged failure of the Committee to confine itself to these terms of reference that initially provoked controversy.⁴ For the text it submitted attempted to embrace, as comprehensively as possible, all aspects of the complex problems facing indigenous peoples—not only in regard to their living and working conditions, but also those pertaining to their protection and progressive integration into the life of their respective countries. A brief summary of the major provisions of the convention will reveal more clearly the nature of the difficulties to which its adoption gave rise.

Article 1, the definition of the populations to whom the convention applies, contains two notions: (1) tribal or semi-tribal populations who are regarded as indigenous on account of their descent from the populations which inhabited the country at the time

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¹ Convention (No. 107) concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries: *U.N. Treaty Series* (No. 4738), vol. 328, p. 247.

² For a summary of the activities of the I.L.O. in this field see I.L.O., *Indigenous Peoples, Studies and Reports* (New Series, No. 35, 1953), pp. 582–614.

³ Text of Proposed Conclusions concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, submitted by the Committee on Indigenous Populations: *Proceedings of the International Labour Conference*, 39th Session (1956), Appendix XI, p. 747.

⁴ The Australian employers' delegate expressed particularly strong views on this point: *ibid.*, pp. 531–2. The Reporter of the Committee replied that when the Governing Body referred to 'living and working conditions' it did so 'in order to adopt a document of some nineteen pages, and in that document virtually every sentence postulated some measure of protection or of integration as a means towards improving the living and working conditions of indigenous peoples'; *ibid.*, p. 543.

of conquest or colonization, and who continue to live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong; (2) other tribal or semi-tribal populations living in similar backward social and economic conditions, whose status is regulated wholly or partially by their own customs and traditions, or by special laws.¹

In the first part, dealing with matters of general policy, the convention places on governments the primary responsibility for developing systematic and co-ordinated action for the protection of the populations concerned, and their gradual integration into the national community. It is stated that measures taken to this end shall tend towards enabling indigenous peoples to enjoy on an equal footing the rights and opportunities granted to the rest of the population, towards promoting their social, economic and cultural development and raising their standards of living, and towards creating genuine possibilities of national integration for them. All such measures, it is proclaimed, shall be directed towards fostering individual dignity and enhancing individual usefulness and initiative. The use of force or coercion is prohibited. Where necessary, but only so long as necessary, special measures for the protection of the institutions, persons, property and labour of these populations are to be adopted, but these measures must not be allowed to create or prolong a state of segregation. The convention also calls for the provision of opportunities for the development of initiative among indigenous peoples and for the stimulation of civil liberties and elective institutions among them. At the same time, the populations concerned are to be permitted to retain their own laws, customs and institutions, where these are not incompatible with the national legal system or the objectives of integration programmes. Moreover, the methods of social control practised by indigenous groups are to be used as far as possible for dealing with crimes committed by members of the group, and where the use of such methods is not feasible, the customs of these populations in regard to penal matters shall be borne in mind by the authorities and courts dealing with such cases (Articles 2 to 8).

The remaining parts of the convention provide, *inter alia*, for the recognition and protection of the rights of ownership over lands indigenous peoples traditionally occupy, safeguards against harmful alienation of land, and equality with other sections of the national community in the allocation of additional land and of the means with which to work the existing land (Articles 11 to 14); effective protection with regard to recruitment and conditions of employment (Article 15); equality of opportunity in vocational training and, where necessary, provision of special training facilities (Article 17); encouragement of handicrafts and rural industries, both as a factor in economic development and as a means of preserving the artistic and cultural heritage of the populations in question (Article 18); extension of social security schemes and establishment of government health services based on social, economic and cultural needs (Articles 19 and 20); equality of educational opportunity, the implementation of educational programmes adapted to the stage reached by each particular group in the process of integration, and provision for a progressive transition from the mother tongue to the national language (Articles 21 to 23); the elimination of prejudice against indigenous populations among the rest of the national community (Article 25); and, finally, the creation or development of government agencies to plan, co-ordinate and execute measures of protection and integration, to initiate proposals for legislative and other measures, and to supervise the application of these measures (Article 27).

¹ Article I confines the scope of the convention to indigenous peoples inhabiting independent countries. Those living in dependent territories are covered by the Social Policy (Non-Metropolitan Territories) Convention, 1947.

The contention that this far-reaching text exceeded the competence of the I.L.O. was advanced primarily by the employers' advisers, and although at no time did it represent the view of the majority,¹ its rebuttal was left chiefly to the workers' delegates,² at the 39th and 40th Sessions of the International Labour Conference. The Conference debates on the question were far from analytical, but the problem of *vires* would appear to have assumed, in effect, three forms: (i) the competence of the I.L.O. under the terms of its constitution; (ii) the Organization's competence with respect to matters falling within the domestic jurisdiction of member States; and (iii) the Organization's competence *vis-à-vis* other specialized agencies.

(i) *International Labour Organization's Competence under the Constitution*

The alleged constitutional incompetence of the I.L.O. with respect to the proposed convention was founded largely on the ground that, apart from the provisions regulating recruitment, conditions of employment and social security, it lacked that 'specific labour content' with which international labour conventions must be exclusively concerned.³ The convention, it was argued, dealt instead with matters patently unsuitable for deliberation within the tripartite structure of the Organization. But although opponents of the instrument persisted throughout in the view that the protection and integration of indigenous peoples could never be regarded as one of the purposes for which the I.L.O. was established, they declined to elaborate upon the blunt terms in which this conviction was expressed.

Those who sought to uphold the Organization's competence were not slow to remind the Conference of the convenient flexibility of the I.L.O. Constitution. Its sweeping terms testify to the authors' intention 'to avoid any formula which, being inspired by the circumstances of the moment, might impede future progress of the Organization by preventing it from taking such action as later circumstances might require'.⁴ The attention of delegates was drawn also to two early advisory opinions of the Permanent Court of International Justice, in which a broad interpretation of the I.L.O.'s competence had been vigorously upheld;⁵ close study of the constitutive treaty had led the

¹ An amendment moved in the Committee on Indigenous Populations at the 39th session, to revise the draft convention to exclude all provisions relating to other than labour and social security matters, was rejected by 4 votes to 64, with 8 abstentions. At the 40th session the Conference itself ultimately adopted the convention by 179 votes to 8, with 45 abstentions.

² The confrontation between workers and employers was a recurrent feature of the debates. The Brazilian workers' delegate, for example, found it 'very strange that Mr. Vilanos Ramos, probably on behalf of the employers' group, should at the last moment resort to the manoeuvre of raising the question of our competence. The ten years' experience that I have of the ILO . . . prompts me to say to him that this manoeuvre of the employers' group is very well known. I warn delegates on the workers' and government sides not to be impressed by it'. *Proceedings of the International Labour Conference*, 40th Session (1957), p. 404.

³ *Ibid.*, 39th Session, p. 532. Some delegates also maintained that the text failed to embody the 'precise obligations' which the constitution requires of any genuine convention. Article 19 (1) of the constitution, however, merely states: 'When the Conference has decided on the adoption of proposals with regard to an item in the agenda, it will rest with the Conference to determine whether these proposals should take the form (a) of an international Convention, or (b) of a Recommendation to meet circumstances where the subject, or aspect of it, dealt with is not considered suitable or appropriate at that time for a Convention.' If international labour conventions were permitted to contain only 'precise obligations', many would need to be rewritten. See McMahon, 'The Legislative Techniques of the I.L.O.', this *Year Book*, 41 (1965-6), p. 1.

⁴ *The International Labour Organization: The First Decade* (Preface by Albert Thomas, 1931), p. 96.

⁵ *P.C.I.J. Advisory Opinions*, Publications of the Court, Ser. B, Nos. 2, 13: No. 2, concerning the competence of the I.L.O. to regulate the conditions of labour of persons employed

Court to the conclusion that the aims of the Organization were stated in language which 'could hardly be more comprehensive'.¹

Supporters of the convention, however, were equally reluctant to discuss the constitutional aspect of the problem save on the most general level. Quotation from constitutional texts in the course of debate was a rare event. Nor was any reference made to a third advisory opinion of the Permanent Court² which, by holding the I.L.O. incompetent to study proposals for the organization and development of methods of agricultural production (and 'other questions of a like character'), indicates that the sphere of activity marked out for the Organization by its constitution, however broadly phrased, falls far short of providing it with *carte blanche* for all new aspirations.

A closer scrutiny of the constitutional background to the convention may not therefore be out of place here. A consideration of the population groups at which the convention is directed provides a suitable starting-point; this will be complemented by an examination of the issues raised by the substantive content of the convention itself.

(a) *The populations to which the convention applies*

It will have been observed that Article 1 defines the populations covered by the convention largely on the basis of the backward social and economic conditions in which they exist, rather than by their means of livelihood, of which no mention is made. The scope of the convention is thus in marked contrast to that of the five previous conventions adopted by the I.L.O. to cope with the labour problems of indigenous populations.³ In particular, it clearly extends to those so-called 'primitive peoples' who, still largely isolated from civilizing influences by the near impenetrable forest and jungle which they inhabit, continue to subsist by hunting, food-gathering and, in some cases, simple forms of agriculture.⁴ The constitutional grounds upon which the I.L.O. enjoys the right to interest itself in the fate of such peoples is less than self-evident.

The constitution of the I.L.O. defines in Article 1 the competence of the Organization by reference to its aims and purposes, as set forth in the preamble to the constitution. The preamble roundly declares that the object of the I.L.O. is the amelioration of the lot of workers and the adoption to that end of measures relating to such matters as 'the regulation of hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness,

in agriculture. No. 13 concerning the competence of the I.L.O. to regulate incidentally the personal work of the employer.

¹ Ibid., No. 2, p. 27.

² Ibid., No. 3, p. 49, concerning the competence of the I.L.O. to examine proposals for the organization and development of methods of agricultural production.

³ Recruiting of Indigenous Workers Convention, 1936; Contracts of Employment (Indigenous Workers) Convention, and Penal Sanctions (Indigenous Workers) Convention, both adopted in 1939; Contracts of Employment (Indigenous Workers) Convention, 1947; Abolition of Penal Sanctions (Indigenous Workers) Convention, 1955. The only instrument of comparable scope to the present convention is the Social Policy (Non-Metropolitan) Convention of 1947, of which certain very general provisions apply to the 'peoples' of non-metropolitan territories indiscriminately. Of its twenty substantive articles, however, eleven (Articles 8 to 18) are limited to 'wage-earners', 'independent producers', or simply 'workers'.

⁴ Brazil and Bolivia, for instance, both informed the I.L.O. Committee of Experts on the Application of Conventions and Recommendations, on their ratification of the convention, that they considered it applicable to their forest-dwelling Indian populations. *Summary of Reports on Ratified Conventions*, Report III (i), International Labour Conference, 52nd Session (1968), pp. 198-9.

disease and injury arising out of his employment . . . and other measures'.¹ Hardly surprisingly, these guide-lines were not drafted with an eye to the primitive tribesman, to whom the idea of 'wages', 'employment' and 'the working day' is quite alien.

In advisory opinion No. 2, the Permanent Court ruled that the I.L.O. was competent to regulate the conditions of labour of persons employed in agriculture on the ground that agriculture must be understood as being included in the term 'industry', to which alone the constitution refers.² The Court cited in this connection the Oxford Dictionary definition of 'industry'—'systematic work or labour; habitual employment in some useful work; . . . a particular form or branch of productive labour; a trade or manufacture'—and decided that, although used in a restricted sense in opposition to agriculture, the word 'industry', in its 'primary and general sense included that form of production'. It is difficult to see how a tribal food-gatherer can be described, by any stretch of the imagination, as the 'systematic', 'habitual', industrial worker with whose welfare alone the I.L.O. is properly concerned. Nor does the primitive ordinarily engage in any 'form of production', if that term is intended to connote the creation of surplus wealth to be exchanged in the market for other goods.

In this context, the Declaration of Philadelphia yields rather more than the constitution itself.³ The preamble to the Indigenous and Tribal Populations Convention relies upon the Declaration in that, by Part II (a), it 'affirms that all human beings have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity', and this affirmation is substantiated by several, more meaningful, provisions elsewhere in the Declaration. Part III brings out more clearly than the constitution 'the solemn obligation of the I.L.O. to further among the nations of the world programmes which will achieve: (a) full employment and the raising of standards of living'. Primitive peoples may presumably be regarded as unemployed for this purpose. Part IV refers to measures 'to promote the economic and social advancement of the less developed regions', while Part V 'affirms that the principles set forth in this Declaration are fully applicable to all peoples everywhere and that, while the manner of their application must be determined with due regard to the stage of economic and social development reached by each people, their progressive application to peoples who are still dependent, as well as to those who have already achieved self-government, is a matter of concern to the whole civilised world'.

Although this latter pronouncement, in speaking of dependent peoples who have not yet achieved self-government, undoubtedly had foremost in mind the colonial peoples of non-metropolitan territories, there is no reason why it should not be equally applicable to primitive peoples inhabiting independent countries. Many peoples of inferior civilizations, although living within the metropolitan territory, form ethnic groups quite distinct from the rest of the national society, often on lands administered separately from the remainder of the country, and are hence closely comparable to those subjected to the impact of civilization from overseas. Ignorant of the official language, they take no part in public life, the principal institutions of which are unknown to them; consequently, they are a long way from achieving self-government, in the sense of being

¹ 'Other measures', the Court decided, 'must mean measures to improve the conditions of labour and to do away with injustice, hardship and privation.' Advisory Opinion No. 3 (above, p. 385 n. 2), p. 57.

² Advisory Opinion No. 2 (above, p. 384 n. 5), pp. 33-9.

³ On the constitutional revision carried out by the Conference held in Montreal in 1946, the Declaration was annexed to the text of the revised constitution so as to form an integral part of it.

capable of expressing an opinion, by informed and democratic processes, as to their political status and future.¹

If it is accepted that Part V renders the principles elaborated by the Declaration applicable to 'the indigenous and other tribal and semi-tribal populations in independent countries', the path is then open to the I.L.O. to secure their 'progressive application' to those populations, by measures having 'due regard to the stage of economic and social development reached by each people'. And it is the comprehensive approach which this difficult and delicate task would seem to necessitate that has dictated the extensive scope of the 1957 convention.

(b) *The substantive content of the convention*

The I.L.O. has long taken the view that 'in the last resort indigenous communities must be regarded as inexorably destined to become integrated into modern society'.² Inevitably, therefore, contact will be established with national or foreign labour markets. Members of some of the less isolated nomadic and semi-nomadic tribes, living in geographically and economically marginal areas, already work as seasonal labourers in forest or mining undertakings, and on coffee, rice, or sugar plantations.³ But even a limited introduction of tribal groups to the concepts of a modern wages system may modify or destroy tribal authority, mutual aid, family relationships and political institutions.⁴ Faced with such considerations, the I.L.O. has produced a convention grounded on the principle that the disappearance of the social values of indigenous peoples cannot be permitted before they have been prepared for the acceptance of other values, and before a place has been prepared for the newly integrated community in the national society. From this it follows that policies aimed at the integration and protection of the populations concerned must be implemented before their welfare as workers can be adequately safeguarded.

The proposition that the Organization may regulate matters of incidental concern to the improvement of conditions of labour was established by the Permanent Court in advisory opinion No. 13,⁵ where it declared: 'The High Contracting Parties clearly intended to give the I.L.O. a very broad power of co-operation with them in respect of measures to be taken in order to assure humane conditions of labour and the protection of workers. It is not conceivable that they intended to prevent the Organization from drawing up and proposing measures essential to the accomplishment of that end.' Upon this basis the Court upheld the competence of the I.L.O. to propose for the protection of wage-earners 'a regulative measure to the efficacious working of which it was found to be essential to include to some extent work done by employers'. It is significant, however, that the Court refused 'to indicate the limits of any discretionary

¹ This is the essence of the thesis by which the Belgian Government sought to extend the obligations imposed by Chapter XI of the U.N. Charter on Member States responsible 'for the administration of territories whose peoples have not yet attained a full measure of self-government', to States containing primitive peoples within their metropolitan boundaries (U.N. Doc. A/AC, 67/2, 8 May 1953). The eventual rejection of the 'Belgian thesis' (G.A. Res. 1541 (XV) 15 December 1960) was based partly on political grounds and partly on the history of Chap. XI, which makes reasonably clear its drafters' intention that it should be limited to colonial territories. Part V of the Philadelphia Declaration is not thus restricted, since it refers to 'all peoples everywhere'.

² 'Report of Second Session of I.L.O. Committee of Experts on Indigenous Labour', *International Labour Review*, 70 (1953), pp. 418, 425.

³ I.L.O. *Indigenous Peoples* (Studies and Reports, New Series, No. 35), p. 202.

⁴ Charles, 'Tribal Society and Labour Legislation', *International Labour Review*, 65 (1952), p. 423.

⁵ Advisory Opinion No. 13 (above, p. 384 n. 5), p. 18.

powers which the I.L.O. may possess as regards the making of incidental regulations'.¹ What is 'incidental' in this context? The Indigenous and Tribal Populations Convention, it may be thought, offers a particularly strong case for stretching this doctrine of incidental powers to its outer limits.

The view was widespread among delegates that the problem of indigenous peoples was an integral one demanding an integral solution; whatever the legal or constitutional niceties of this all-embracing approach, it was said, there was no realistic alternative.² To the contention, for example, that questions of land tenure are outside the purview of the I.L.O. because they are unconnected with labour, the Egyptian Government adviser replied that 'in the very early stage of the historical evolution of men it has been confirmed by scientists and historians that you cannot separate labour from the land when dealing with primitive society. To such populations there would be no labour without land.'³ Again, the Peruvian employers' delegate: 'If because of a scruple about the observance of the specific competence of the I.L.O. the educational and other aspects of the problem had not been approached, then a scientific solution would not have been found.'⁴ (Some employers' delegates reached similar conclusions by a different route. To promote the integration of 'backward' peoples by raising their standards of living, they pointed out, means to increase the number of consumers in the society at large and hence assists industrial expansion; a higher educational level leads to a greater individual responsibility and a higher *per capita* output, and so a comprehensive instrument was fully justified.)

Representatives of the other specialized agencies who attended the meetings of the I.L.O. Committee on Indigenous Populations fully endorsed these opinions. The U.N.E.S.C.O. expert agreed that the educational and anthropological sides of the problem could not be artificially separated from the scope of the convention merely because they came under the jurisdiction of U.N.E.S.C.O. The W.H.O. and F.A.O. observers were of like mind, the latter stressing that 'the primary rights of these populations in respect of their land should be firmly protected during the period of transition. . . . No policy could be considered adequate if it simply preserved the rights of tribal communities as they stand, since this would be tantamount to economic and social stagnation.'⁵

(ii) *The Convention's Asserted Encroachment upon the Domestic Jurisdiction of Member States*

The convention, it will be remembered, includes measures concerned with such matters as the administration of justice to the populations concerned and the relation-

¹ Advisory Opinion No. 13 (above, p. 384 n. 5), p. 24.

² The workers' group in the Committee declared: 'If the over-all scope of the provision went outside the limits of competence of the I.L.O. it was inevitable that the solutions proposed should also go beyond those strict limits.' Committee on Indigenous Populations, 40th Session, Report VI (i), p. 6. Members of the International Labour Office had recognized the problem many years previously: 'The labour problems which arise in connection with primitive communities are much more closely connected with general economic, sociological and administrative questions than is the case among highly civilised peoples . . . never at any time has the International Labour Office shown any inclination to go beyond the competence with which it was invested by the Peace Treaty . . . but in this case, perhaps more than any other, it has had to recognise that labour was indissolubly bound up with a number of other factors from which it could not be dissociated without distortion.' *The International Labour Organization: The First Decade* (above, p. 384 n. 4), pp. 220-1.

³ Mr. Ibrahim. *Proceedings of the International Labour Conference*, 40th Session (1957), p. 413.

⁴ Mr. Pinilla; *ibid.*, 39th Session, p. 534.

⁵ Committee on Indigenous Populations, 40th Session, Report VI (i), pp. 6-7.

ship between customary law and national legislation, the right of aboriginals over the lands which they have traditionally occupied and the conditions under which their removal from that land is permissible. Not least, States are required to establish special administrative agencies to implement designated programmes aimed at the social, economic and cultural development of indigenous inhabitants.¹ Yet these were issues, some felt, that were solely the responsibility of governments—of domestic, not international concern; by incorporating them, the I.L.O. illegitimately impinged upon the sovereignty of member States.

It is worth recalling in this context, however, that the Permanent Court considered principles of national sovereignty to be irrelevant to the determination of questions of competence,² since the power of the I.L.O. is to propose, not impose, legislative measures. Each member State is required to submit conventions adopted by the Conference to the competent national authority for ratification, but these authorities are perfectly free to accept or reject them. States also exercise a close control over the formulation of conventions; while the making of draft proposals is exclusively committed to the Conference, the settling of the Agenda of the Conference belongs to the Governing Body, half of whose members, as with the Conference itself, represent the governments. The agenda as thus settled must, however, be transmitted to the governments, and any government may object to the inclusion of any item. Items to which objection is made are excluded unless the Conference decides, by a two-thirds majority, to retain them on the agenda notwithstanding. After an item is placed on the agenda, a draft convention can be adopted by the Conference only by a similar two-thirds majority. 'Thus', the Court reasoned, 'wholly apart from the reference of any question or dispute to the Court, the Treaty provides the means of checking any attempt on the part of the Organization to exceed its competence. In this way the High Contracting Parties have taken precautions against any undue extension of the sphere of activity indicated by the Preamble.'³

Member States, however, chose to exercise none of these powers in the present instance. Advocates of the convention were particularly impressed by the fact that of the forty-five States to answer the detailed questionnaire sent out by the International Labour Office,⁴ which dealt with all angles of the proposed instrument and indicated plainly the breadth of its scope, none raised the issue of competence in its reply.

Again, the Conference was frequently reminded of a resolution it had adopted unanimously in 1946, which declared that 'the conditions of life of indigenous populations in independent countries present special problems which should receive prompt and careful attention', and went on to request the Governing Body to consider the desirability of placing this item on the agenda of a forthcoming session of the Conference.⁵ Moreover, the Conference had in the following year adopted the Social Policy (Non-Metropolitan Territories) Convention⁶ which, it was claimed, manifested the belief of the great majority of members⁷ that the Organization could not stop at

¹ Articles 7, 8, 11, 12, 27.

² Advisory Opinion No. 13 (above, p. 384 n. 5), p. 23 '... there appears to be no room for the discussion and application of political principles or social theories, of which, it may be observed, no mention is made in the Treaty'.

³ *Ibid.*, p. 18.

⁴ *Living and Working Conditions of Indigenous Populations in Independent Countries*, Report VIII (2), International Labour Conference, 39th Session (1956).

⁵ Resolution XIV, 29th Session of the Conference, *I.L.O. Official Bulletin*, 29 (1946), p. 363.

⁶ Convention (No. 82) concerning Social Policy in Non-Metropolitan Territories, *U.N. Treaty Series* (No. 2961), vol. 218, p. 345.

⁷ The Conference adopted the convention by 103 votes to 7. On the other hand, by 1957 the convention had been ratified by only four countries—'Why? Mainly because the Conference

technically and culturally advanced communities, but must extend also to backward, less favoured groups. Certain of its provisions are analogous to those of the 1957 convention. In particular, Article 8 stipulates that 'the measures to be considered by the competent authorities for the promotion of productive capacity and the improvement of standards of living of agricultural producers shall include: (c) the control, by the enforcement of adequate laws or regulations, of the ownership and use of land and resources to ensure that they are used, with due regard to customary rights, in the best interests of the inhabitants of the territory'; while Article 19 makes provision for the 'progressive development of broad systems of education, vocational training and apprenticeship'. But the competence of the I.L.O. to promulgate these measures was never challenged.

Delegates were apparently being invited to conclude that this history of acquiescence towards, and support of, I.L.O. activity in respect of indigenous peoples constituted an implicit acknowledgement by States of the wide competence of the Organization in this field; had any member considered its domestic jurisdiction threatened by that activity, it ought to have expressed its concern long before.

That no such threat was anticipated by States is attributable, however, to the fact that they had at their disposal more effective techniques for securing their future freedom of movement than the outright rejection of offensive resolutions and draft conventions. Governments were concerned rather to ensure, in the Committee on Indigenous Populations (from whose draft text the final convention differed only in detail), that the obligations imposed upon them by the proposed convention should be couched in sufficiently flexible terms; and it was here, in one sense, that the issue of competence was truly resolved. The convention is replete with such phrases as 'when necessary' (Articles 3 (2) b, 26 (2)), 'as far as possible' (Article 8 (a)), 'when practicable' (Articles 19, 23 (1)), and 'where appropriate' (Articles 23 (3), 26 (1), 27 (2) a). Article 11, towards which employers' delegates displayed particular hostility, states that 'the right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognized'; but its purpose, according to the International Labour Office, is merely 'to lay down a general principle, and it will be for each government to specify the cases in which the principle should apply'.¹ And in the Office's extensive repertoire of flexibility devices there can be few which confer a wider discretion on national authorities than Article 28 of the convention:

The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.

Finally, measures regarded as unduly ambitious for inclusion in the convention, even in the light of Article 28, were relegated to the supplementary Recommendation on Indigenous and Tribal Populations. Notable amongst these are the provisions relating to the ownership of the underground wealth of aboriginal lands, and to the protection of semi-nomadic tribes whose traditional territories lie across international boundaries.²

adopted a convention outside its purview.' Mr. Yllanos Ramos (employers' delegate, Mexico), *Proceedings of the International Labour Conference*, 40th Session (1957), p. 400.

¹ *Living and Working Conditions of Indigenous Populations in Independent Countries*, Report VI (2), International Labour Conference, 40th Session (1957), p. 18.

² I.L.O. Recommendation No. 104, paras. 4, 35. Para. 35, calling for inter-governmental action to protect nomadic tribes inhabiting frontier zones, was excluded from the convention after the Indian Government member had voiced the opinion that it 'impinged on matters of national security', *ibid.*, Report VI (1), p. 26.

(iii) *The Competing Jurisdictions of other Specialized Agencies: the I.L.O. as Co-ordinator*

In the course of the Conference debates, doubts were also raised as to those sections of the convention dealing with the application to indigenous peoples of national agrarian programmes, the provision of adequate health services and the education and means of communication of these peoples. It was maintained that such items were the joint concern only of governments and one or other of the specialized agencies; by exceeding its jurisdiction in this manner the I.L.O. set a dangerous precedent for the future.

Amongst the organizations in question, however, there was widespread agreement on the need for a single instrument covering all aspects of the problem of indigenous populations—from which resulted a collaborative effort of unusual intensity. Experts from F.A.O., W.H.O., U.N.E.S.C.O. and the United Nations itself took an active part in the preparation of the draft text in the Committee on Indigenous Populations; it was the first time an international labour convention had been drafted in such close co-operation. Close contact was maintained also on the secretariat level. The principle of concerted action under the initiative of the I.L.O. met with the approval of the United Nations Administrative Committee on Co-ordination, and the specialized agencies themselves adopted resolutions endorsing the work of consultation and co-operation and formally approving, once finalized, those provisions of the text relating to their areas of special interest.¹

Beyond this, procedures were formulated to facilitate, at each stage of the I.L.O. supervisory process, continuing collaboration in the application of the convention when it became operative.² On the entry into force of an I.L.O. convention, the Office prepares a draft form of report which, after approval by the Governing Body, forms the basis for the annual reports that States ratifying the convention are required to submit; the specialized agencies were to be consulted on the questions it should contain with respect to those parts of the convention with which they are particularly concerned. Copies of the annual reports themselves would be made available to them, on which they might submit their comments to the I.L.O. Committee of Experts on the Application of Conventions and Recommendations. Their representatives, who attend each session of the International Labour Conference, can follow closely the work of the Conference Committee in connection with the application of the convention, and participate in the consideration of reports received from member States which have not ratified the convention.³ Again the bodies concerned declared their approval of this plan, and expressed satisfaction that it adequately safeguarded their interests.⁴ From all this it would appear that there was no unilateral extension of the competence of the

¹ *W.H.O. Official Records*, No. 79, p. 39, Tenth World Health Assembly, Res. WHA 10.41 (1957); *U.N.E.S.C.O. Executive Board, Summary Records*, 43 EX/Decisions, Resolution 8.1. 4 (1955).

² Set out in a letter from the Deputy Director-General of the I.L.O., addressed to the Director-Generals of the Agencies concerned, 22 November 1956, *ibid.* 48 EX/II, p. 6.

³ To formalize the procedure, the Director-General included in the preamble to the convention the following text: 'Noting that these standards have been framed with the co-operation of the United Nations, the Food and Agricultural Organization of the United Nations, the United Nations Educational, Scientific and Cultural Organization and the World Health Organization, at appropriate levels, in their respective fields, and that it is proposed to seek their continuing co-operation in promoting and securing the application of these standards . . .'

⁴ *W.H.O. Official Records*, No. 79, p. 40; *U.N.E.S.C.O. Executive Board, Summary Records*, 48 EX/Decisions 9.1.III (1957).

I.L.O., nor did the other agencies relinquish their own competence—they were to continue to have their rightful share in the work undertaken.

In the Committee of Indigenous Populations, the representative of the Director-General stated at one point¹ that the view that the Organization was exceeding its competence in adopting the proposed convention 'was admissible only from a strictly legal point of view'; inevitably, the reply was ready that in matters of competence one must necessarily speak strictly.² But the role of 'strict law' in the resolution of this competence conflict was in fact a minimal one. In the Conference discussions a pragmatic approach predominated, and the distinction between *de jure* and *de facto* competence was often obscured. Delegates, it is clear, were impressed less by 'formalistic arguments'³ than by the long record of useful activity already carried out by the I.L.O. on behalf of indigenous peoples.⁴ The recognized ineffectiveness of any piecemeal attempt to alleviate their plight took precedence over all other factors.

Against this, the insistence of the convention's critics that the problem of jurisdictional overlap should be settled by resort to abstract principle was quite unrealistic. Practically speaking, the far-reaching agreement concluded with the international organizations concerned could provide the only satisfactory solution.⁵ Their contention that the convention invaded areas of exclusively domestic concern was also largely misplaced. The spectre of a convention insidiously trespassing upon the sovereignty of States rapidly vanishes in the face of such provisions as Article 28 and the permissive wording in which the convention is generally phrased. On the contrary, the question rather becomes whether its adoption on these terms, in an attempt to secure as wide a ratification as possible,⁶ has not jeopardized the ultimate legal effectiveness of the convention as a whole.

¹ *Proceedings of the International Labour Conference*, 40th Session (1957), Appendix IX, p. 722.

² Mr. Bellingham-Smith (employers' delegate, U.K.), *ibid.*, p. 402.

³ 'Let us not stray into formalistic arguments which we all know are not really important.' Mr. Purilla (employers' delegate, Peru), *ibid.*, p. 403.

⁴ The Andean Programme, in particular, had demonstrated the practicality and value of close collaboration with other international organizations in this field, and was specifically cited to this effect by a number of delegates. Details of this extensive programme of technical assistance are given in the *Report of the Director-General*, Sixth Conference of American States Members of the I.L.O. in Havana (1956), pp. 90-2.

⁵ This much can perhaps be implied in Article 12 of the I.L.O. Constitution, by virtue of which the I.L.O. undertakes to 'co-operate within the terms of this Constitution with any general international organization entrusted with the co-ordination of the activities of public international organizations having specialized responsibilities in related fields'. Article 39 (2) of the Standing Orders of the Conference, which provide for consultation with the United Nations and other specialized agencies in appropriate cases, was invoked as 'sufficient proof in itself that the Conference might include in its decisions on labour problems related matters which are of interest to other international organizations, provided consultation is properly carried out'. Sir Alfred Roberts (Workers' Delegate, United Kingdom), *Proceedings of the International Labour Conference*, 39th Session (1956), p. 541.

⁶ By 1 June 1974, the convention had, in fact, received twenty-four ratifications.

THE ORGANIZATION OF AFRICAN UNITY AND THE CONCEPT OF NON-INTERFERENCE IN INTERNAL AFFAIRS OF MEMBER-STATES*

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In 1972, General Jean Bokassa, President of the Central African Republic, personally led his troops into one of his country's prisons and stood by as the troops clubbed some of the prisoners to death. He then ordered the bodies of both the dead and wounded prisoners to be exhibited publicly while he led the parade of watchers. In 1972 also, the world witnessed one of the most dramatic human tragedies when General Idi Amin of Uganda expelled 20,000 British Asians from his country. Even if it be conceded that he had the legal right to expel the non-citizen, the way they were expelled (enforced sale of property, the mass nature of the expulsion instead of a phased one and the refusal to allow them to take all their movable property out) constituted a violation of international law.

Legality apart, both the episodes cited above were gross violations of human sensibilities and morality. The Organization of African Unity (O.A.U.) made no comment on these episodes, although episodes such as these could not but neutralize whatever sympathy exists in the world for the African causes of anti-racism and anti-colonialism. Governments of the offending States and other member-States of the O.A.U. hid behind the shield of Article III (2) 'non-interference in the internal affairs of States'. It seems clear, however, that hopes of improving the effectiveness of the O.A.U. depend upon surmounting the barrier of Article III (2).

THE GENESIS AND MEANING OF ARTICLE III (2)

That the most vociferous defenders of the O.A.U. are also the most ardent advocates of Article III (2) is no mere coincidence. The history of Pan-Africanism from 1958 on was a fight for the entrenchment of this principle as the cardinal value of African inter-State relationship.¹ Nothing expresses this more succinctly than Azikiwe's celebrated speech to the 1962 Lagos Conference of the Monrovia bloc:

... But there is one basic difference ... it is the conspicuous absence of a specific declaration on the part of the Casablanca States of their inflexible belief in the fundamental principles enunciated at Monrovia regarding the inalienable rights of African States, as at present constituted, to legal equality ... to self-determination ... to safety from interference in their internal affairs through subversive activities engineered by supposedly friendly States ...²

To the extent that the logical expression of a continental Union Government was the disappearance of the concept of 'internal affairs' of the States as they were then constituted, and to the extent also that the functional approach meant a retrenchment of the

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¹ Cf. Scott Thompson, *Ghana's Foreign Policy 1957-1966: Diplomacy, Ideology, and the New State* (1969), pp. 31-9, for the rearguard action fought by Liberia for the entrenchment of this principle before the 1960 influx of the newly independent States. The Sanniquellie Conference should be seen as a culmination of Tubman's efforts.

² *West African Pilot*, 26 January 1962.

same concept for 'internal affairs', then one could say that the debate of the draft charter revolved around this issue. This is confirmed by Chief Justice T. O. Elias when he points out that Articles III (1), (2), (3) and (5) are reinforcing links in a value chain which should be interpreted as 'the desire to be left alone, to be allowed to choose one's particular political, economic and social systems and to order the life of one's community in one's own way'.¹

The debate over the 'non-interference' concept in Addis Ababa was multi-dimensional. There was the fear of some African States over the right, arrogated to themselves by some of the members of the Casablanca bloc, to intervene in the internal affairs of States which they regarded as neo-colonialist. Then there was the second fear of non-African intervention in African affairs. In addition, there was the third fear, as expressed by Houphouët-Boigny of Ivory Coast, of 'subversive intrigues originating in third African States, which are accomplices of foreign States hostile to our unity and therefore to our real independence and happiness'.² Of course, it hardly needs to be said that different African States or groups of States were preoccupied with the different sources of intervention.³

In spite of the fact that the assassination of President Olympio of Togo happened five months before the Addis Ababa conference, only Nigeria proposed intervention of the first type as a separate agenda item,⁴ while eight proposed intervention of the second type,⁵ and only three, Ivory Coast, Cameroun and Nigeria, devoted parts of their speeches to the first.⁶ Even when one compares the decisions of the O.A.U. conference with the proposals made there one can only come to the conclusion that a loophole was left on this issue of intervention. The working paper tabled by Ethiopia⁷ had a preambular paragraph expressing the determination 'to safeguard the hard-won independence, sovereignty, territorial integrity of our States and to resist the neo-colonialism in all its forms including political and economic intervention'; the paper also had Article 1 (1c), which called for defence of territorial integrity, and Article 1 (2f), which called for joint co-operation for defence. This meant a preoccupation with intervention of the second type while leaving the impression of condoning intervention of the first type.⁸ But Article II (Principles) dealt with non-interference in the internal affairs, while Article V was even more explicit: 'Each Member-State has a solemn and sacred duty to respect the rights enjoyed by all other Member-States in accordance with

¹ T. O. Elias, *Africa and the Development of International Law* (1972), p. 127.

² *Proceedings of the Summit Conference on Independent African States*, CIAS/GEN/INF/31, vol. 1, Section 2 (Addis Ababa, May 1963).

³ Cf. 'Organization of African Unity: the Practice of Recognition of Governments', in *Perspectives in African Foreign Policy* (ed. by Kola Adelaja) to be published by Ife University Press. In an earlier article, I used the word 'subversion' which I have replaced with 'intervention' here. 'Subversion' and 'intervention' are generically related, with 'subversion' being more serious. The aim of 'subversion' if externally directed is towards destruction of, or fundamental changes in, the government institutions of the target country, whereas the aim of intervention is less drastic and limited. However, there are doubts as to whether this distinction exists in the minds of African Governments or should in fact exist. Financial aid given to a trade union just for the purpose of having a friendly trade union is intervention. But if this aid proves crucial in strengthening the union for a confrontation with Government, then it could be a case of subversion.

⁴ *Proceedings* (above, p. 394 n. 2), Section 1, Agenda/CONF/10.

⁵ *Ibid.*, Ethiopia, Agenda/Conf./1; Somalia, Agenda/Conf./2; Nigeria/Conf./10; Egypt/1/Add. 1; Mali, Conf./1/Add. 2; Congo (Kinshasa) Conf./1/Add. 3; Senegal Conf./11; Tunisia, Conf./1/Add. 4; and Ivory Coast Conf./12.

⁶ *Ibid.*, CIAS/GEN/INF/10, . . . /31, . . . /35.

⁷ *Ibid.*, Draft Proposal by Ethiopia for the Organization of African States, Comm. 1/EMPC/1.

⁸ See also Article VII (6) and Article XXV of the same draft.

international law. They shall refrain from any subversive activity against neighbouring or other States. The rights of Member-States include, *inter-alia*, the right of a State to defend its territorial integrity, to exercise within its boundary, jurisdiction over all its inhabitants and to freely determine cultural, economic, and political life without interference and intervention.' At best, the whole draft creates an impasse since Article V is not compatible with the preambular paragraph.

The recommendation of the conference of Foreign Ministers to the O.A.U. inaugural summit tilted the scales in favour of a blanket condemnation of all types of intervention when it devoted four of its eight principles to the issue, including (e) 'unreserved condemnation of political assassination as a means of gaining power as well as subversive activities on the part of neighbouring States or any other States'.¹ However, its definition of 'the end of military occupation of the African continent, in particular the closing of military bases' as 'an essential element for African independence and unity'² can be regarded as condoning actions designed to fulfil that 'essential element': in other words the subversion of neo-colonialist regimes. This is confirmed by the fact that the draft charter of the summit conference brought back the original Ethiopia wording on neo-colonialism and made it its third preambular paragraph, although its effect was reduced by limiting Article II (d) (Purposes) to eradication of colonialism.³ This draft was adopted unchanged to become the charter of the Organization of African Unity. Therefore our conclusion will have to be that if one interprets the O.A.U. provisions against intervention in terms of objectives set out in the clause on neo-colonialism from the Casablanca charter, then the door was not all that tightly shut against subversion of neo-colonialist regimes while by implication, the door was bolted against subversion of African Governments which were not neo-colonialist.

However, before pursuing this line of inquiry any further, another issue must be raised. Earlier on reference has been made to Article V of the Ethiopia draft with its phrase 'to respect the rights enjoyed by all other Member-States in accordance with international law'. Even though this article did not survive the drafting stage, the argument still continues whether the O.A.U. charter could detract from rights enjoyed by African States under international law.

In reference to Article 2 (1e) of the O.A.U. charter: 'To promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights', T. O. Elias had this to say: 'One sees also in this respect a reminder that the Member-States conceive of their organization as necessarily coming within the regional arrangements which paragraph 1 of Article 52 of the United Nations Charter permits.'⁴ But Zdenek Cervenka argues persuasively against this view. His interpretation of a report of the United Nations Secretary-General to the United Nations General Assembly was: 'Although the O.A.U. welcomes the possibility of close co-operation [with the United Nations], it does so strictly on the basis of equality and partnership.'⁵

But let us assume for the moment that Elias is correct and that the O.A.U. is a regional organization of the United Nations under the auspices of Article 52 (1) and that the charter of the O.A.U. cannot detract from rights conferred by the United

¹ Comm. 1/Dra. Res./16, and CIAS/P/an./2.

² Ibid.

³ CIAS/COMM/REPORT/1. This wording was also repeated in CIAS/SP. COMM/CHARTER submitted by the special committee of Foreign Ministers. In both documents half of the principles to be adopted by the proposed organization retained their condemnation of all forms of intervention.

⁴ Elias, op. cit. (above, p. 394 n. 1), p. 125.

⁵ Cervenka, *The Organization of African Unity and its Charter* (1969), p. 112.

Nations Charter, then it is pertinent to ask what definitions the United Nations has given to the concept enshrined in its Article 2 (7): 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State . . .'. One need not worry about the difference in wording between the United Nations Article 2 (7) and O.A.U. Article III (2) since it could be argued that whatever is within the domestic jurisdiction of any State is within its own internal affairs. The previous international organization, the League of Nations, had a different wording. Its Article 15 (8) read: 'If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report . . .'. Even though Inis Claude maintains that the League prescription of 'solely within the domestic jurisdiction' is less restrictive than the United Nations 'essentially within the domestic jurisdiction',¹ most writers on the United Nations seem to agree with Oppenheim that 'the language adopted by the Charter results in a limitation of the competence of the United Nations less rigid than that following from Article 15 (8) of the covenant'.²

Irrespective of the original intention of the founding fathers of the United Nations which was woolly on this point anyway,³ in actual implementation the United Nations has adopted Oppenheim's definition of 'intervention' which reads "'intervention" in its accepted technical meaning is conceived as dictatorial, mandatory interference intended to exercise direct pressure upon the State concerned . . . it does not rule out action by way of discussion, study, enquiry and recommendation falling short of intervention'.⁴ Inasmuch as the United Nations has interpreted the domestic jurisdictional clause, the Advisory Opinion of the International Court of Justice in the *Certain Expenses* case put it in a nutshell:⁵

. . . when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations the presumption is that such action is not *ultra vires* the Organization.

Hence, the United Nations has usually asserted jurisdiction over extremely wide areas including those of human rights. If one considers the O.A.U. in its relationship to the United Nations, then in view of what has been said above, the limiting factor on 'intervention' and 'internal affairs' could not come from the United Nations practice but would have to be inherent in the O.A.U. charter—which was shown earlier on not to be the case⁶—or imposed by O.A.U. practice which we shall deal with later on.

Yet even if it appears that, both in theory and practice, the United Nations attitude to the interpretation of Article 2 (7) of its Charter has been a very restrictive one, it would not necessarily have followed that it was incumbent on the O.A.U. to follow the same path. The years 1958–63 were formative ones in Africa in a rather special way in the context of the struggle to establish an inter-State system founded on agreed rules. Of course this is not to suggest that Pan-Africanism is older than nationalism, but rather that nationalism in Africa was equally an assertion of the differences between Africans and non-Africans. Hence it was only logical that the principles of the inter-State system which the new States sought to create would not be just a replica of

¹ Claude, Jr., *Swords Into Plowshares* (4th ed., 1971), p. 182.

² *International Law* (8th ed., 1955), p. 415.

³ Claude, op. cit. (n. 1 on this page), p. 183.

⁴ Oppenheim, op. cit. (n. 2 on this page), pp. 415–16.

⁵ Louis B. Sohn, *Recent Cases on United Nations Law* (1963), p. 37.

⁶ In 1965 the O.A.U. adopted a declaration on the Problem of Subversion to plug the original loophole, but it had no effect on subsequent O.A.U. practice in this respect.

existing conventional and customary principles of international law. One need not labour this point any further except to quote the view of Professor Ali Mazrui about the conviction of the African States that they were building a continental system with operative rules different from international law:¹

... International law now seems to be intended to govern relations between States in general and makes no distinction as between continental locations of States. But African diplomacy appears to recognise two levels of law. One level is indeed that of international law to govern relations between nations at large. The other level is a kind of Pan-African law to govern relations between African States themselves. This latter is still much less codified than is traditional international law . . . So far the ultimate documentary expression of Pan-African law is the charter of the Organization of African Unity.

It has been mentioned that the series of compromises reached in drawing up the O.A.U. charter at best left the issue of intervention in neo-colonialist regimes unresolved; and also, that the United Nations usage of 'intervention' is pretty elastic, while its attitude to 'domestic jurisdiction', sanctioned by a dictum of the International Court of Justice, is a direct function of its purposes. We have shown above the emergence of a nascent Pan-African law of which Article III (2) of the Charter and O.A.U. is a principle. It has been asserted by Chief Justice Elias that in fact this non-interference principle is an absolute prohibition:² a point he made in terms of the reinforcing effects of Article III (1), (3) and (5). If this assertion of an absolute prohibition is correct, what is one to make of Article III (7): 'affirmation of a policy of non-alignment with regard to all blocs'? While affirmation presupposes the existence of a state of affairs and hence Elias is right that 'it is the avowed foreign policy of nearly all the Member-States',³ the fact remains that this Article does impose a limitation on the foreign policy alternatives available to Member-States; and, to the extent that foreign policy is to a large extent determined by domestic affairs, Article III (7) constitutes interference in the internal affairs of Member-States. It is no negation of this argument to assert with Elias that 'it is nevertheless a policy which, if carefully thought out and executed with discretion, appears in the long run to be the only possible one for the developing States'.⁴ The fact still remains that it is a collective principle capable of imposing obligations on States with second thoughts. To this extent then, an absolute prohibitive value cannot be ascribed to Article III (2).

However, even if one's argument on this theoretical basis fails, there is evidence to suggest that O.A.U. practice does not regard Article III (2) as absolutely prohibitive. The first group of instances is provided by O.A.U.'s handling of civil wars as illustrated by the Nigerian and Congolese (Zaire's) civil wars.

THE NIGERIAN CIVIL WAR⁵

From the beginning, the Federal Government of Nigeria had claimed that the war was a Nigerian internal affair. Yet, at the very first O.A.U. meeting of the Assembly of Heads of States and Governments after the outbreak of the civil war, the Kinshasa 1967 summit, the Assembly discussed the war. Whether the motive for the discussion was 'humanitarian' as Cervenka has asserted,⁶ or condoned by the Nigerian Government once it was assured of support, is irrelevant. The O.A.U. asserted its competence

¹ Ali Mazrui, *Towards a Pax Africana: A study of Ideology and Ambition* (1967), p. 118.

² Elias, op. cit. (above, p. 394 n. 1).

³ Ibid., p. 128.

⁴ Ibid., p. 129.

⁵ This section is not meant to be an encapsulated history of the Nigerian Civil War. For a detailed and competent documentary history of the war see Kirk-Greene, *Crisis and Conflict in Nigeria* (1971), vols 1 and 2.

⁶ Cervenka, op. cit. (above, p. 395 n. 5), p. 196.

by discussing it, adopting a resolution on it, and setting up a Consultative Committee consisting of six Heads of State. Again, it makes no difference that the resolution recognized the situation as an internal affair of Nigeria. Either this was just a double-talk or the O.A.U. did not regard what it was doing as intervention. Initially, the job of the Consultative Committee was just to convey to General Gowon the 'Assembly's desire for the territorial integrity, unity and peace of Nigeria'. Even then it was with the utmost reluctance that General Gowon received the Committee on 23 November 1967 and told it bluntly: 'The O.A.U. has rightly seen our problem as a purely domestic affair and, in accordance with the O.A.U. resolution, your Mission is not here to mediate.'¹ The Committee responded by reaffirming its faith in Nigerian unity.

By 1968, the Committee decided to drop the charade and was plainly playing a mediatory role. Thus at its July 1968 Niamey talks, discussion was centred around truce and relief supplies, and the Committee heard at different times both General Gowon and Colonel Ojukwu. It is very instructive to note that the second paragraph of the Committee's Communiqué reads:

The Nigerian Federal Military Government and Colonel Ojukwu have agreed to resume as soon as possible peace negotiations in Addis Ababa under the auspices of the O.A.U. Consultative Committee on Nigeria.

The preliminary talks between experts on both sides were in fact held in Niamey from 20 to 26 July 1968, while the full-dress peace negotiations were held in Addis Ababa in August 1968 under the chairmanship of the Emperor of Ethiopia. Finally, in September 1968, the Nigerian Civil War was again debated at the Algiers O.A.U. summit. Meanwhile it should be stressed that in the expression of its collective view the O.A.U. never deviated from its support for the territorial integrity of Nigeria.

THE CONGOLESE (ZAÏRE'S) CIVIL WAR

Out of the series of crises that the present Zaïre Republic went through from 1960 to 1964, the one that is relevant here is the crisis surrounding the appointment of Moïse Tshombe as the Prime Minister on 10 July 1964. The others are excluded because they were all manifestations of external involvement: Belgian invasion and United States-dropped paratroopers and so on. The only one of these episodes without any manifest physical external involvement was the situation created by the appointment of Tshombe as the Premier. Hence it qualified as a typical case of 'internal affairs'. The first O.A.U. summit was held ten days after Tshombe's appointment. Although M. Théodore Idzumbuir, the Foreign Minister, attended the meeting of the Council of Ministers, Moïse Tshombe was prevented from attending the summit conference because of the very strong objections raised by Ahmed Ben Bella of Algeria, Nkrumah of Ghana, Apithy of Dahomey, Hassan II of Morocco and Mahoud Riad of the United Arab Republic. Their opposition rested on the role of Tshombe as one-time leader of secessionist Katanga who had employed white mercenaries and hence was regarded as a traitor to the cause of African Unity.² The interesting thing, however, is that in view of the civil war raging in the Congo (now Zaïre) and before the intervention of mercenaries, another O.A.U. conference set up an *Ad Hoc* Commission on the Congo. One of the missions undertaken by the Commission was to Washington to appeal to the United States to stop the supply of arms to the Congo.

¹ *Daily Times*, 24 November 1967.

² Interview with Jaja Wachuku, former Nigerian Foreign Minister.

If these two cases of civil wars are considered alongside each other, certain things become obvious. First, the O.A.U. Consultative Committee was set up, and mediated in the Nigerian Civil War, in spite of the Nigerian protestation that the civil war was a matter of Nigerian internal affairs. Secondly, the O.A.U. Assembly of Heads of States and Governments discussed and voted on the Nigerian civil war in spite of the protests of the Nigerian Government. Thirdly, the O.A.U. *Ad Hoc* Commission on the Congo (now Zaïre) was set up in spite of the objection by the Government of that State. Fourthly, one of the things that this Commission tried to do was to stop the supply of arms to what at that time was the legally constituted Government of that State.

In the case of Nigeria, the collective, although not consensual, view of the O.A.U. was that the civil war was indeed a matter of Nigerian internal affairs. In the case of the Congo (now Zaïre) the general feeling was that it was still a Congolese internal affair. That definitely was the view of the Nigerian Government though it agreed to serve on the Commission.¹ However, this did not prevent the O.A.U. from discussing these issues, passing resolutions and setting up committees on them. Obviously, the conclusion then is that the O.A.U. does not consider that 'intervention' covers discussions, resolutions and committees.

THE *COUP D'ÉTAT* SYNDROME

Right from its inception, the O.A.U. has been faced with the problem of how to handle governments coming to power through illegal seizure of power. The first crisis was the *coup d'état* in Togo which occurred even before the O.A.U. was created. However, at the inaugural conference of the O.A.U., the new regime in Togo was prevented from attending the conference because of the opposition of Nigeria, Guinea, Tanganyika, Sierra Leone, Ivory Coast, Niger and the Central African Republic. When Nkrumah was overthrown in 1966, the next O.A.U. summit witnessed an attempt to deny participatory legitimacy to the new regime. When this failed, Congo (Brazzaville), Guinea, Mali, Tanzania, Kenya and Mauritania refused to take part in the proceedings. Finally, when Milton Obote was overthrown on 25 January 1971 by General Idi Amin, another crisis was created for the O.A.U. Both Idi Amin and the deposed Obote sent delegations to the 1971 sixteenth session of the O.A.U. Ministerial Council held in Addis Ababa. Somalia, Guinea, Tanzania, Zambia, Sudan, Algeria and Mauritania supported Obote's delegation, while other countries supported Amin's delegation. Neither was seated and the Conference broke up without debating any of the items on the agenda.

No hard and definite conclusions can be drawn from these episodes because of all the coups that have taken place only three have been the subject of O.A.U. discussion. For O.A.U. discussion to take place, three conditions must be present: The coup, two rival delegations turning up at an O.A.U. conference, and sponsors for both delegations. In other cases of *coup d'état*, a combination of the latter two conditions has been missing. But the important point to note is that the three cases considered by the O.A.U. have become precedents.

CONCLUSION

It has been shown how the O.A.U. became involved in two cases of civil wars and three cases of *coup d'état*: all episodes which could be argued to qualify for the

¹ See the address of the Nigerian Prime Minister to the Congolese Ambassador in *West African Pilot*, 26 September 1964.

terminology 'internal affairs'. We have also seen how one could argue that in the cases of the civil wars the O.A.U. did not consider its actions to constitute 'intervention'. However, it will be difficult to argue that denying the Togolese Government the right to participate at the inaugural conference of the O.A.U. and refusal to seat the Idi Amin delegation at the 1971 sixteenth session of the O.A.U. Ministerial Council meeting did not constitute intervention.

When dealing with the United Nations approach to Article 2 (7) of its Charter, it was discovered that the court-sanctioned rule was that anything which was to further the realization of the purposes of the organization could not be *ultra vires* the organization. Let this principle now be applied to the O.A.U. In the preamble to the O.A.U. charter, there is the reaffirmation of the 'inalienable right of all people to control their own destiny'. Article 2 (1d) also listed, as one of the purposes of the O.A.U., the eradication of 'all forms of colonialism from Africa'. There is the authority of Elias that 'in the preamble are to be found some of the fundamental postulates of the Organization of African Unity'.¹ If this is so, then combining the bit of the preamble quoted above with Article 2 (1d) makes the eradication of colonialism one of the fundamental purposes of the O.A.U. If this is so, then anything which impedes the anti-colonial crusade should be of O.A.U. concern; e.g. policies of some Governments in Africa which portray Africans as being racist and having too little regard for human life and dignity. The strategy of the O.A.U. for the liberation of Southern Africa has been a mixture of support for the freedom fighters and appeal to the conscience of the international community. The O.A.U. cannot successfully appeal to the conscience of the international community when Member-States of the Organization are trampling on human rights and human life without a murmur from the Organization. In cases where domestic policies of Member-States of the O.A.U. have negative repercussions on the anti-colonial and anti-racism crusades, the O.A.U. should consider passing resolutions expressing its concern just as it did in the cases of the civil wars. This will not be intervention. In fact this could be criticized as being of very little significance but 'in short measures, life may perfect be'.

Elias, op. cit. (above, p. 394 n. 1), p. 124.

THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE AUSTRIAN CONSTITUTIONAL COURT*

By H. PETZOLD

1. Before 1973, the right to a fair trial guaranteed under Article 6 of the European Convention on Human Rights was on several occasions the subject-matter of judgments by the Austrian Constitutional Court. Thus, in 1960 and 1961 the Court held that Article 6 was not self-executing and therefore not applicable by Austrian courts, a view reached on the basis that the Convention was on the same footing as an ordinary law in the Austrian legal order.¹ After the entry into force of the 1964 Federal Constitutional Law,² giving the Convention constitutional status in Austria, the jurisprudence of the Constitutional Court on the point changed. In a judgment of 14 October 1965, it held that a claim under Article 6 of the Convention 'must henceforth be considered as based on a constitutional provision and in this respect is comparable to the right that everyone has to a hearing before a tribunal established by law, in accordance with Section 83, sub-section 2 of the Constitutional Law'.³

Later, there were numerous cases before the Constitutional Court which raised questions on the interpretation of Article 6 of the Convention. Two major problems in this regard were the interpretation or construction to be placed upon the term 'civil rights and obligations' (*droits et obligations de caractère civil*) and the meaning of the expression 'independent and impartial tribunal' (*tribunal indépendant et impartial*) in paragraph (1) of that Article. On 29 June 1973, the Court gave a decision which is of considerable importance in this context: referring to a judgment of the European Court of Human Rights, the Constitutional Court annulled Section 13, sub-section 4, No. 1 of the 1970 Tyrol Real Property Transactions Act, on the ground that it violated Article 6, paragraph (1), of the Convention and was therefore unconstitutional. The annulment became effective on 31 December 1973.⁴

2. In that case, four constitutional appeals were introduced by private persons against decisions whereby the Tyrol Regional Real Property Sales Commission had refused to approve three contracts for the sale of agricultural holdings and one contract for a

* © H. Petzold, 1974.

¹ Judgment of 27 June 1960: *Collection of Judgments and Decisions of the Constitutional Court* (hereinafter cited as *Sammlung* 1960), No. 3767; English translation, *Yearbook of the E.C. on Human Rights*, vol. 3, pp. 616-22; Judgment of 16 December 1951, *Sammlung* 1961, No. 4122. As to the first judgment see: Ermacora, *Handbuch der Grundfreiheiten und der Menschenrechte* (1963), pp. 5-6; Golsong, this *Year Book*, 38 (1962), p. 452; Pfeifer, *Juristische Blätter* (1961), pp. 527-30; Vasak, *La Convention européenne des droits de l'homme* (1964), pp. 228-32.

² Section 11, No. 7 of the Federal Constitutional Law of 4 March 1964 modifying and adding to certain provisions of the Federal Constitutional Law (text of 1929) relating to the State Treaties, *Bundesgesetzblatt*, No. 59, 6 April 1964; English translation, in: *Yearbook of the E.C. on Human Rights*, vol. 7, p. 444.

³ *Sammlung* 1965, No. 5100; English translation, *Yearbook of the E.C. on Human Rights*, vol. 9, pp. 734-45; Section 83, sub-section 2 reads: 'No person may be withheld from his own legal judge'; English text, Peaslee, *Constitutions of Nations*, vol. 3, p. 48.

⁴ Section 140, sub-section 3 of the Federal Constitutional Law reads: 'The judgment of the Constitutional Court by which a law or a certain part thereof is annulled as being unconstitutional, shall oblige the Federal Chancellor or the Landeshauptmann concerned to promulgate the annulment immediately. The annulment shall become effective on the date of the promulgation, unless the Constitutional Court fixes a time limit for the annulment. This time limit shall not exceed one year'. Peaslee, *ibid.*, p. 66.

lease.¹ Under the 1970 Tyrol Act,² the Regional Commission, which has its seat in the office of the Provincial Government and from which there is no further appeal,³ consists of seven members: the president is the member of the Provincial Government responsible for agricultural matters, five members are appointed by that Government, and one member is appointed by the Federal Ministry of Justice.

Having regard to the judgment given on 16 July 1971 by the European Court of Human Rights in the *Ringeisen* case,⁴ the Constitutional Court considered that the Regional Commission, in refusing to approve the aforementioned contracts, might be said to have determined civil rights and obligations in the sense of Article 6, paragraph (1), of the Convention. If this were so, the question would then arise whether the Regional Commission was an independent and impartial tribunal as required under Article 6, paragraph (1). The Court, which referred on this point also to the *Ringeisen* judgment⁵ felt doubts for two reasons: first because the said provision of the 1970 Tyrol Act provided that the Commission should be presided over by a member of the Provincial Government, and secondly because the Act contained no provision prescribing the length of the term of office of the Commission. On the assumption that its decision would rest on Section 13 of the 1970 Tyrol Act, the Court stayed the proceedings on the constitutional appeals and opened an *ex officio* inquiry on the compatibility of this provision with the Austrian Constitution.⁶

3. In the *Ringeisen* case, the European Court of Human Rights was concerned *inter alia* with the complaint that the applicant, an Austrian citizen, was not given a fair hearing under Article 6, paragraph (1), of the Convention when he introduced proceedings to obtain approval of a transfer of real property consisting of farmland. Ringeisen alleged that six members of the Upper Austrian Regional Commission, which refused to approve the transfer, had been biased. The Constitutional Court when it rejected the applicant's appeal in 1965, examined the issue under the general rule of the Constitution, which accords everybody the right to be judged by the judge established by law. Considering that a board does not cease to be competent because a biased member takes part in the proceedings, the Court held that even if the allegations of bias were correct, the applicant was not affected in his aforementioned constitutional right. Moreover, although the Convention has had the status of a constitutional provision in Austria since 1964, Article 6, paragraph (1) was not referred to by the Court in that decision.⁷

The European Court, in its judgment of 16 July 1971, held that Ringeisen's complaint involved the determination of 'civil rights and obligations': in its view, this expression covers all proceedings the result of which is decisive for private rights and obligations. The Court ruled that for Article 6, paragraph (1), to be applicable to

¹ Under the 1970 Tyrol Act, every transfer of ownership and granting of usufructuary right by legal act *inter vivos* in respect of a piece of land given over to agriculture or forestry, is in principle subject to approval; refusal of such approval renders the transaction null and void; see Sections 1, 3, 4 and 16 of that Act, *Landesgesetzblatt für Tyrol* (1971), No. 4, pp. 5-13. Similar Acts exist in the other *Länder* of the Republic; cf. for Upper Austria: *Ringeisen* case, judgment of 16 July 1971, *Publications of the European Court of Human Rights*, Series A, vol. 13, paragraph 15, p. 7.

² Section 13, sub-section 4, No. 1.

³ It hears appeals from decisions of the District Real Property Sales Commission.

⁴ Paragraph 94, p. 39 of the *Ringeisen* judgment.

⁵ Paragraph 95, p. 39.

⁶ According to Section 140, sub-section 1, of the Federal Constitutional Law, the Constitutional Court shall pronounce judgment *ex officio* upon the unconstitutionality of a Federal or Land law if such a law forms the basis of the judgment of the Constitutional Court.

⁷ Paragraphs 22-3, pp. 11-12, of the *Ringeisen* judgment.

a case, it is not necessary that both parties to the proceedings should be private persons, and the character of the legislation which governs how the matter is determined (civil, commercial, administrative law) is of little consequence. The Court continued: 'when Ringeisen purchased property from the . . ., he had a right to have the contract for sale which they had made with him approved if he fulfilled, as he claimed to do, the conditions laid down in this Act. Although it was applying rules of administrative law, the Regional Commission's decision was to be decisive for the relations in civil law (*de caractère civil*) between Ringeisen and . . .'.¹

The Court then passed to the question whether the complaint of non-observance of Article 6, paragraph (1), was well founded. Before finally rejecting it,² the Court held that the Regional Commission was a 'tribunal' within the meaning of Article 6, paragraph (1), 'as it is independent of the executive and also of the parties, its members are appointed for a term of five years and the proceedings before it afford the necessary guarantees'.³ On that point, the Court referred to its earlier jurisprudence in the *Neumeister*⁴ and in the *De Wilde, Ooms and Versyp* cases.⁵

4. In its judgment of 29 June 1973, the Austrian Constitutional Court first recalled that under the Constitution the Regional Commission's decisions were not subject to any control by administrative tribunals,⁶ so that, if Article 6, paragraph (1), of the Convention were to apply, the Commission itself had to be organized as a 'tribunal' within the meaning of that Article. The Court then examined the question as to whether the Regional Commission determined civil rights and obligations. Referring to the *Ringeisen* judgment, the Court declared that it would follow the European Court's interpretation of Article 6, paragraph (1), according to which the expression 'determination of civil rights and obligations' covers all proceedings the result of which is *decisive*⁷ for private rights and obligations. The Court held that this was so with regard to the approval of a contract for sale as well as of a contract for a lease.

Having thus admitted the applicability of Article 6, paragraph (1), the Court considered the question whether the Regional Commission was an 'independent tribunal'. It answered this question in the negative for two reasons. First, because the 1970 Tyrol Act provided that a member of the Provincial Government should sit on the Commission, thereby creating a personal link between the Commission and the executive. The Court declared it to be a *contradictio in se* to assume independence from the executive when the executive itself participates in the decision-making process. The second reason for the Court to find the Commission not to be an independent tribunal was that the members who were appointed by the executive could be removed by it at any time since the 1970 Tyrol Act contained no provision specifying their term of office. The Court pointed out that this particular situation would make it possible for the executive to interfere even with cases under consideration and that this possibility

¹ Paragraph 94, p. 39, of the *Ringeisen* judgment.

² Because 'even if Ringeisen's assertions were in fact true, they would not support the conclusion that there was bias on the part of the Regional Commission', *ibid.*, paragraph 97, p. 40.

³ *Ibid.*, paragraph 95, p. 39.

⁴ *Neumeister* judgment of 27 June 1968, *Publications of the European Court of Human Rights* Series A, vol. 8, p. 24.

⁵ *De Wilde, Ooms and Versyp* judgment of 18 June 1971, *ibid.*, Series A, vol. 12, paragraph 78, pp. 41-2.

⁶ Because the Regional Commission is a collegiate authority and Section 133 of the Federal Constitutional Law provides that matters in which the final decision rests with such a board shall be excluded from the jurisdiction of the Administrative Court; see Peaslee, *op. cit.* (above, p. 401 n. 4) p. 64.

⁷ Underlined by the Constitutional Court.

alone affected the independence of members of that Commission. The Court underlined that it understood the considerations of the European Court in the *Ringeisen* judgment on the term of office of the members of the Commission in Upper Austria¹ to indicate one factor ensuring their independence.

5. As a result of the judgment of the Constitutional Court, the independence of the Regional Commission will doubtless be strengthened so that appellants will have all guarantees of a fair hearing before that Commission. Apart from this more immediate effect, the judgment is noteworthy because the Court based its decision of annulment not only on the Human Rights Convention but more especially on a judgment given by the European Court. It is true that this is not the first time that a national court has referred to the jurisprudence of the European Court and expressly accepted its interpretation of the Convention,² but in none of the other cases have the consequences of such reference been so far-reaching as in this one. For in following the European Court's interpretation of the expression 'civil rights and obligations' in Article 6, paragraph (1), of the Convention, the Constitutional Court developed its jurisprudence along new lines. In numerous earlier cases, the Constitutional Court had sought by reference to the constitutional clause on the competence in 'civil law matters' to answer the question whether a national authority determined a 'civil right or obligation'.³ It had left open the question whether Article 6, paragraph (1), of the Convention would apply to cases involving the determination of a right which does not fall under that concept.⁴ By following the European Court's decision in the *Ringeisen* case, the judgment of 29 June 1973 introduces into the Austrian legal order a new general criterion for the interpretation of Article 6, paragraph (1), of the Convention.⁵

If one takes the view that in Austria, as in other States-Parties to the Convention where its provisions are part of the law of the land, the courts are not under an express legal obligation to follow the European Court in its interpretation of the Convention,⁶ this case clearly shows 'que l'autorité des organes européens chargés d'assurer le respect de la Convention commence à se faire sentir'.⁷

¹ See above, p. 403.

² See Rolin, *L'autorité des arrêts et des décisions des organes de la Convention européenne des Droits de l'Homme* (Rapport présenté au colloque de Grénoble, 25 et 26 janvier 1973), *Human Rights Review* (1973), pp. 745-6.

³ Section 10, sub-section 1, no. 6 of the Federal Constitutional Law (*Zivilrechtssachen*); for text see Peaslee, *op. cit.* (above, p. 401 n. 3), p. 25. See, for example, *Sammlung* 1965, Nos. 5100 and 5102; 1968, No. 5666.

⁴ Emphasized by the Court in its judgment of 29 June 1973; see also judgments cited above, in the preceding note.

⁵ The interpretation of Article 6, paragraph (1), has become particularly difficult in the German-speaking countries because of a rather unhappy translation into German of the expression 'civil rights and obligations'; see Golsong, *The Judicial Protection Against the Executive* (edited by H. Mosler, 1971), vol. 3, pp. 254 et seq.

⁶ On this point see Alkema, *Bestuurswetenschappen* (1972), pp. 440-6; Bürgenthal, *International and Comparative Law Quarterly* (1965), Supplement No. 11, pp. 97-100; Pahr before the European Court of Human Rights in the *Ringeisen* case, *Publications of the Court*, Series B, p. 72. It may be of interest to note that the Consultative Assembly of the Council of Europe has proposed in its Recommendation 683 (1972) to the Committee of Ministers that a study be made of 'the possibility of adding to the existing machinery of the European Convention on Human Rights a procedure enabling national courts to address requests for preliminary rulings to the Court of Human Rights on a problem of interpretation of the Convention'.

⁷ Rolin, *op. cit.* (above, this page, n. 2), p. 745.

LOW-TIDE ELEVATIONS AND STRAIGHT BASELINES*

By GEOFFREY MARSTON¹

In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, Article 4 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone permits the employment of the method of straight baselines joining appropriate points in drawing the baseline from which the breadth of the territorial sea is measured. Among the provisions which define this power more closely is paragraph 3 of Article 4, which reads:²

Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.

Article 11 (1) of the same Convention describes a low-tide elevation as a naturally formed area of land which is surrounded by and above water at low-tide but submerged at high tide.

It is proposed to trace the history of Article 4 (3) and to discuss some of the legal problems to which its application could give rise.

1. THE *ANGLO-NORWEGIAN FISHERIES CASE*, 1949-51

This case provides a convenient starting-point for considering the history of the paragraph although the use of low-tide elevations was only a small issue in the litigation. By an application dated 28 September 1949, the United Kingdom Government challenged before the International Court of Justice the validity in international law of a system of straight baselines from which Norway had established an exclusive fisheries zone four nautical miles in breadth off its north and north-west coasts. This delimitation, made by a Royal decree in 1935 as slightly amended in 1937, comprised 47 consecutive straight baselines joining 48 notional fixed points on the mainland, on islands and on rocks.³ Nowhere on the stretch of coastline covered by the system did the baseline follow the low-water line on permanently dry land. The United Kingdom conceded that the zone, which it accepted as synonymous with the Norwegian territorial sea, should extend four rather than three miles,⁴ but it argued that the zone must be measured from baselines drawn 'in accordance with the principles of international law'. It asked the Court, *inter alia*, to 'declare the principles of international law to be applied in defining base-lines' and also to 'define the said base-lines in so far as it appears necessary . . . in order to avoid further legal difficulties'. In its written pleadings, the United Kingdom submitted that

. . . the primary test of the base-line, from which Norway's zone of territorial sea is to be delimited, is the tide mark on Norway's land territory, whether mainland, islands or rocks.

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² *United Nations Treaty Series*, vol. 516, p. 205. Forty-five States are currently Parties.

³ In addition to the large-scale charts filed by the litigant States, maps showing the Norwegian delimitation can be found in *Netherlands International Law Review* 1 (1954), at pp. 256-7, and, with less detail, in this *Year Book*, 28 (1951), p. 115.

⁴ *I.C.J. Reports*, 1951, pp. 116, 126.

Imaginary straight lines drawn between two points of Norwegian territory are only permissible as base-lines when they represent the natural line marking the entrance to an indentation which is Norwegian internal waters.¹

Nothing in this submission suggests that the United Kingdom was of the view that straight baselines, the very subject-matter of the dispute, could validly be drawn to and from low-tide elevations. It is relevant, therefore, to examine the circumstances in which the United Kingdom did admit that straight baselines crossing areas of sea could validly be drawn. Four such circumstances may be disengaged from its written and oral pleadings:

- (1) Where there was a well-marked indentation of the coast whose penetration inland was in such proportion to the width of its mouth that it constituted more than a mere curvature of the coast then a straight baseline could be drawn across the indentation at the nearest points to the entrance where the indentation did not exceed 10 miles in width.²
- (b) Where a strait or sound connecting the high seas with inland waters lay between a permanently dry island and the mainland or, alternatively, between two permanently dry islands then a straight baseline could be drawn across the strait or sound at the nearest points to the entrance where the interval was not more than 10 miles.³
- (c) Where there was proof that the coastal State had a historic title to the waters of certain bays or sounds then a straight baseline even exceeding 10 miles in length could be drawn between the natural headlands of such an indentation.⁴
- (d) Where a permanently dry island or islands lay in or off the opening of a bay (or a feature as described in (b) above) which was more than 10 miles wide then straight baselines could be drawn across the opening using each island as a stepping-stone provided that each interval did not exceed 10 miles. This delimitation was subject to the condition that the island or islands in fact closed the bay by throwing coastwise navigation outside the island or islands.⁵

In these four circumstances not only was there no mention that low-tide elevations could be used as 'staging-posts' in a straight baseline system but they were specifically excluded from situations (b) and (d).⁶

What were the circumstances in which the United Kingdom considered that low-tide elevations could validly be used in the delimitation of the territorial sea? In its Memorial, the United Kingdom made the following submission:

An elevation of the sea bed, only above water at low tide, which is situated within the territorial belt of a mainland (or of a permanently dry island) counts as a piece of territory for the purpose of the delimitation of territorial waters. It is sufficient for the purpose of this rule that the elevation is only partially within the territorial belt, in which case the whole of the elevation is so taken into account.⁷

Later in its pleadings, the United Kingdom argued that

. . . the base-line of the Norwegian coast, as of any other coast, consists in part of the actual shore line of the territory at low tide (including elevations of the sea bed entitled to be taken into account as territory . . .) and in part of straight lines closing indentations.⁸

¹ *Anglo-Norwegian Fisheries case (United Kingdom v. Norway)*, I.C.J. Pleadings, vol. 2, p. 682.

² *Ibid.*, vol. 1, p. 83; vol. 4, p. 457.

⁴ *Ibid.*, vol. 4, p. 457.

⁶ 'Low-tide elevations cannot, however, be used for measuring a 10-mile interval', *ibid.*, p. 79.

⁷ *Ibid.*, p. 78.

³ *Ibid.*, vol. 1, p. 84.

⁵ *Ibid.*, vol. 1, p. 84.

⁸ *Ibid.*, vol. 2, p. 682.

On large-scale charts submitted to the Court, the United Kingdom traced what it considered should be the true Norwegian baseline (the 'firm green line') and the true outer limit of the Norwegian territorial sea (the 'green pecked line'). The firm green line was drawn as a straight line across bays and analogous indentations only; elsewhere it followed the low-water mark on dry land. On these charts, the United Kingdom 'took account' of low-tide elevations situated within 4 miles from dry land not by drawing the firm green line to and from such features (this line continued to follow the low-water mark) but by constructing a bulge in the green pecked line.¹ Such features were thus taken account of 'as territory' only to the extent that an area the breadth of the territorial sea could be measured from them, this area itself being territorial sea; they were not regarded 'as territory' to the extent that straight baselines could be drawn to and from them.

The United Kingdom caused confusion, however, by referring elsewhere to 'base-points' in such a context as to suggest that it was conceding that low-tide elevations might be used as 'staging-posts' in a system of straight baselines provided only that such elevations were within 4 miles of permanently dry land.

Thus, after asserting that Norwegian Base Point 21, Vesterfall in Gasan, was an elevation of the seabed not qualifying as an island and lying not less than 8 miles from any permanently dry land, the United Kingdom submitted in its Memorial that:

It cannot . . . be properly used as a base-point for measuring the territorial sea of the nearest island, let alone of the mainland of Norway.²

Similarly, in its Reply, the United Kingdom asserted:

It is common ground that an elevation of the sea bed not permanently above water, which is situated within four miles of the low-water mark of permanently dry Norwegian territory, is entitled to be taken into account as a base-point for the delimitation of Norwegian territorial waters. The chief point of difference is as to the status of an elevation not permanently above water (a low-tide elevation) all of which lies more than 4 miles from the nearest permanently dry territory.³

In these passages, the United Kingdom could not in reality have been conceding that straight baselines were permitted to be drawn to and from such elevations since such an argument would have been inconsistent with its own idea of the Norwegian baseline and outer limit as indicated by the two types of green line on the charts. The only way in which to reconcile these passages with those already quoted and with the green line delimitations is to assume that by 'base-points' the United Kingdom meant 'baselines' and that it was really considering the 'bulge' effect caused by a low-tide elevation on the delimitation of the outer limit of the territorial sea as measured from permanently dry land. There are, however, at least two vital differences between the use of such features as 'base-points' or 'staging-posts' in a straight baseline system and the use of such features as 'baselines' for constructing the outer limit of the territorial sea: first, on the 'staging-post' use a low-tide elevation will permit the construction of a band of territorial sea extending seaward from each of the straight baselines running to and from the feature, bands which, however short their baselines, will inevitably contain a greater area of territorial sea than that contained in the single 'bulge' on the alternative construction; secondly, the 'staging-post' use of a low-tide elevation not only adds to the area of territorial sea in the manner just described but in

¹ e.g. *Omgangs Boen* on Chart 3 (*ibid.*, p. 692).

² *Ibid.*, vol. 1, p. 26.

³ *Ibid.*, vol. 2, p. 510.

addition constitutes all waters on the landward side of the two straight baselines as *internal* waters, whereas the 'bulge' adds only to the area of the *territorial* sea.

In view of the ambiguous language of the United Kingdom, in particular its use of the term 'base-points', it is not surprising that Norway considered that its opponent was referring to low-tide elevations in a straight baseline system (the facts of the case, indeed) and was conceding in this context the validity of using low-tide elevations situated within 4 miles of permanently dry land. Norway thus argued in reply as follows:

... il est arbitraire et sans fondement de limiter le choix des points de départ à des roches situées à moins de 4 milles marins de la laisse de basse mer du territoire norvégien ne couvrant jamais.

*Mais cette divergence de vues est sans importance pour le présent litige, car le décret royal de 1935 n'a utilisé comme points de départ aucune roche qui découvre à marée basse et qui soit distante de 4 milles marins, ou plus, de la laisse de basse mer du territoire norvégien ainsi défini.*¹

By 'points de départ' in this passage, it is clear that Norway was referring to the use of low-tide elevations as 'staging-posts' in a straight baseline system, not as 'baselines' relevant only for constructing the outer limit of territorial sea.

In his oral address to the Court, the United Kingdom Agent² spent some time discussing the effect of low-tide elevations on the delimitation of the territorial sea but he made no mention of the validity or otherwise of straight baselines drawn to and from such features. Again he stressed the United Kingdom's view that low-tide elevations 'in the open sea' could not be treated as islands having their own territorial sea.³ His main concern was to demonstrate that three of the Norwegian basepoints were 'rocks awash' and not 'low-tide elevations' and, moreover, that one of them, No. 21, was 8 miles from the nearest permanently dry island since a feature 1 mile from it was, in his submission, itself only a drying rock. The United Kingdom Agent concluded as follows:

... the use of such a rock as [No. 21,] which at low water is not even drying but only awash and which is at least 7½ miles away from any permanently dry land is inadmissible for both these reasons.⁴

He did not submit that the use of the feature was inadmissible on the simple ground that it was, at best, a low-tide elevation. Yet the very dispute before the Court raised the precise question whether straight baselines could ever validly be drawn to and from, *inter alia*, low-tide elevations; it was not directly concerned with the question whether or not a low-tide elevation within the territorial sea caused a 'bulge' in the outer limit of that sea.

In his revised and final conclusions, the United Kingdom Agent submitted that, subject to the delimitation of historic bays, the baseline of the territorial sea must be either the low-water mark on permanently dry land or, alternatively, the 'proper closing line' of internal waters, this 'proper closing line' being the closing line in bays as defined earlier. With regard to low-tide elevations, he maintained:

That, where there is a low-tide elevation situated within 4 sea miles of permanently dry land, or of the proper closing line of Norwegian internal waters, the outer limit of Norwegian territorial waters may be 4 sea miles from the outer edge (at low tide) of this low-tide elevation. In no other case may a low-tide elevation be taken into account.⁵

¹ *I.C.J. Pleadings*, vol. 3, p. 84 (original emphasis).

² The late Sir Eric Beckett.

³ *I.C.J. Pleadings*, vol. 4, p. 93.

⁴ *Ibid.*, p. 148.

⁵ *Ibid.*, p. 457.

It seems clear that the Agent was referring here to the 'bulge' effect and that by implication he was denying the validity of the 'staging-post' construction. But the United Kingdom never put this view squarely before the Court as a submission.

Not surprisingly, the Norwegian Agent, M. Arntzen, concentrated on showing that the three points in dispute were in fact 'low-tide elevations', not 'rocks awash', and that the feature 1 mile from Point 21 did not cover at high tide.¹

On 18 December 1951, the Court held, by a substantial majority, that the method employed by Norway for the delimitation of its exclusive fisheries zone was not contrary to international law, and, by a smaller majority, that the baselines fixed in application of the method were not contrary to international law. The Court dealt rapidly with the issue of the use of low-tide elevations:

The Parties . . . agree that in the case of a low-tide elevation (drying rock) the outer edge at low water of this low-tide elevation may be taken into account as a base-point for calculating the breadth of the territorial sea. The Conclusions of the United Kingdom Government add a condition which is not admitted by Norway, namely, that, in order to be taken into account a drying rock must be situated within 4 miles of permanently dry land. However, the Court does not consider it necessary to deal with this question, inasmuch as Norway has succeeded in proving, after both Parties had given their interpretation of the charts, that in fact none of the drying rocks used by her as base points is more than 4 miles from permanently dry land.²

The case leaves the present writer with a feeling of regret that the United Kingdom did not take full advantage of the potential arguments open to it. By stressing throughout its pleadings the primacy of the low-water mark, with the closing line in bays as the only exception, it must therefore have regarded straight baselines drawn to and from low-tide elevations (and *a fortiori* permanently dry land) as invalid irrespective of their distance from the 'normal' baseline. But nowhere did the United Kingdom expressly state that this was indeed its submission. Instead, it continued to concede in ambiguous language that low-tide elevations could be 'taken into account' as 'base-points' if situated within 4 miles of permanently dry land or the closing line in bays. One of the Counsel for Norway, M. Jens Evensen, appreciated what the United Kingdom must have intended, for in an article published in December 1952 he wrote:

As the main rule [in the United Kingdom's contentions] was laid down that only land permanently above water possessed territorial waters of its own, a bank or rock exposed only at low tide was to be taken into account for measuring the territorial waters of a state only if it was situated within the territorial belt of permanently dry land whether this dry land be the mainland or an island. And it was evidently not the intention of the United Kingdom to admit that islands, islets or rocks, even if thus situated, could be used as base points for straight base lines as done in the 1935 decree, but solely that such elevations formed a part of the 'normal coastline' from which the territorial belt should be measured by following the geographic configuration of the coast. The only concession made to the base-line system was in case of islands and islets lying in or off the mouth of a bay.³

Norway, understandably, did not trouble itself to rewrite the United Kingdom's submission, and the Court, equally understandably, misinterpreted it as being a concession on the use of straight baselines. Thus Norway obtained a bloodless victory

¹ Ibid., pp. 562-4.

² *Anglo-Norwegian Fisheries case*, Judgment of 18 December 1951, *I.C.J. Reports*, 1951, p. 128; cf. Lord McNair, p. 166.

³ Evensen, 'The Anglo-Norwegian Fisheries Case and its Legal Consequences', *American Journal of International Law* 46 (1952), pp. 609, 612-13.

once it had proved to the Court's satisfaction that all the low-tide elevations used by it were in fact within 4 miles of permanently dry land.

2. THE INTERNATIONAL LAW COMMISSION'S WORK

At its third session in 1951, the International Law Commission decided to initiate work on the topic of the regime of territorial waters, which it had already selected for codification and to which it had given priority pursuant to a recommendation contained in General Assembly Resolution 374 (IV) of 6 December 1950. The distinguished Dutch jurist, J. P. A. François, who had been rapporteur to the committee on territorial waters at the League of Nations Codification Conference in 1930, was appointed Special Rapporteur.

In his first report to the Commission, dated 4 April 1952, François included as draft Article 5 the following text:

1. Comme règle générale et sous réserve des dispositions concernant les baies et les îles, l'étendue de la mer territoriale se compte à partir de la laisse de basse mer, le long de toutes les côtes.
2. Toutefois, s'il s'agit d'une côte profondément découpée d'indentations ou d'échancures, ou bordée par un archipel, la ligne de base se détache de la laisse de basse mer, et la méthode des lignes de base reliant des points appropriés de la côte doit être admise. Le tracé des lignes de base ne peut s'écarter de façon appréciable de la direction générale de la côte, et les étendues de mer situées en deça de cette ligne doivent être suffisamment liées aux domaines terrestres pour être soumises au régime des eaux intérieures.
3. On entend par la laisse de basse mer celle qui est indiquée sur la carte officielle employée par l'Etat riverain, à condition que cette ligne ne s'écarte pas sensiblement de la laisse moyenne des plus basses mers bimensuelles et normales.
4. Les élévations du sol situées dans la mer territoriale, bien qu'elles n'émergent qu'à marée basse, sont prises en considération pour le tracé de cette mer.¹

Paragraph 4 would thus seem to have applied both to the 'normal' situation envisaged by paragraph 1 and to the 'straight baseline' situation envisaged by paragraph 2, provided the feature was situated within the territorial sea. François made no mention of any practical difference between the areas of territorial sea produced by the use of low-tide elevations in each of the two situations.

François' second report, dated 19 February 1953, contained the following redraft of paragraph 4 of draft Article 5:

Elevations of the sea-bed which are only above water at low tide and are situated partly or entirely within the territorial sea shall be treated as islands for the purpose of determining the outer limit of the territorial sea.²

In his commentary, François stated that a drying rock was deemed to be an island for territorial sea purposes only if it was situated partly or entirely within the territorial sea extending from the coast. It is not clear from the redrafted paragraph whether he still considered that such elevations were so assimilated to islands that they could be used as basepoints in a straight baseline system.

¹ *Yearbook of the I.L.C.*, 2 (1952), pp. 32-3. There is no convenient English text of the whole draft article.

² *Ibid.*, 2 (1953), p. 65 (English text from Whiteman, *Digest of International Law*, vol. 4, p. 297, hereinafter cited as *Whiteman*).

In April 1953, at the invitation of François, a committee of five experts met to consider certain technical problems. In answer to the question which line might preferably be taken as the low-water line, the Committee's report ran:

Except as otherwise provided for, the baseline for measuring the territorial sea should be the low-water line along the coast as marked on the largest-scale chart available. . .

. . . rocks (and similar elevations) awash at the datum of the chart . . . should not be taken into consideration.

Drying rocks and shoals that are exposed between the datum of the chart and high water, if within the territorial sea, may be taken as individual points of departure for measuring the territorial sea, thereby causing a bulge in the outer limit of the latter.¹

The report later declared:

The Committee agreed that 'straight baselines' should not be drawn to and from drying rocks and shoals. Their part in measuring the territorial sea has been stated [above].²

François then submitted amendments and additions to his draft Article 5 to take account of the Committee of Experts' recommendations. After stating in paragraph 2 that rocks awash should not be taken into consideration, he proposed as paragraph 3:

Drying rocks and shoals that are exposed between the datum of the chart and high water if within the territorial sea may be taken as individual points of departure for measuring the territorial sea, thereby causing a bulge in the outer limit of the latter.³

He proposed a new draft article to cover straight baselines. Stating that, in general, the maximum permissible length of a single straight baseline should be 10 miles and that islands encompassed by the system should not be more than 5 miles from the coast, François added the provision: 'The base-lines should not be drawn to and from drying rocks and shoals.'⁴ On 4 February 1954, the Special Rapporteur presented his third report on the territorial sea. In this he drastically reordered the provisions relating to low-tide elevations. The exceptional situation, where straight baselines could be used, was covered by draft Article 6, the second paragraph of which read: 'Base-lines shall not be drawn to and from drying rocks and shoals.'⁵

A new and separate provision was inserted as draft Article 13 to cover what had previously appeared in a different form of words as draft Article 5 (3). The new draft article read:

Drying rocks and shoals that are exposed between the datum of the chart and high water and are situated wholly or partly within the territorial sea may be taken as individual points of departure for measuring the territorial sea.⁶

In his commentary on this draft article, François stated:

A distinction has been made between islands and drying rocks. An island off the coast, even if situated outside the territorial sea, always possesses a territorial sea of its own. A drying rock is only deemed an island in this respect when situated wholly or partly within the territorial sea along the coast. A drying rock lying outside the territorial sea

¹ *Yearbook of the I.L.C.*, 2 (1953), p. 77. (English text from *I.C.J. Pleadings (North Sea Continental Shelf cases)*, vol. 1, pp. 254-5.)

² *Yearbook of the I.L.C.*, 2 (1953), p. 78 (English text as above, p. 256).

³ *Ibid.*, p. 76 (English text from *Whiteman*, p. 299).

⁴ *Yearbook of the I.L.C.*, 2 (1953), p. 76 (English text *Whiteman*, *ibid.*).

⁵ *Yearbook of the I.L.C.*, 2 (1954), p. 3 (English text *ibid.*, 1 (1954), p. 65, n. 7).

⁶ *Yearbook of the I.L.C.*, 2 (1954), p. 5 (English text *ibid.*, 1 (1954), p. 94, n. 7).

possesses no territorial sea of its own. The rapporteur would point out, however, that there is not complete unanimity on this point.¹

The relationship between the normal and the straight baseline construction of the territorial sea with respect to low-tide elevations first came under discussion in the Commission during its 257th Meeting, held on 29 June 1954. Zourek, who a few days earlier had suggested the deletion of draft Article 6 (2),² stated that in his view there was a contradiction between that paragraph and draft Article 13.³ Nevertheless, at its 258th Meeting, held on 30 June 1954, draft Article 6 (2) was adopted by the Commission by 7 votes to 4, with 2 abstentions, in the following form:

As a general rule the maximum permissible length for a straight base line shall be ten miles. Such base lines may be drawn in accordance with paragraph 1, between headlands of the coast line or between any such headland and an island less than five miles from the coast, or between such islands. The drawing of a longer line may be permitted; in that case, however, no point on such lines should be farther than five miles from the coast. Base lines shall not be drawn to and from drying rocks and shoals. Such lines shall be deemed to separate inland waters from the territorial sea.⁴

Draft Articles 6 (2) and 13 were discussed at the 260th Meeting of the Commission, held on 2 July 1954. François stated the 'gist' of Article 13 to be

... that a drying rock within T miles of the coast (where T = breadth of the territorial sea) could serve to extend the territorial sea by causing a bulge in the outer limit of the latter.⁵

The Chairman, Sandström, then remarked that there appeared to be some discrepancy between draft Articles 6 (2) and 13 since the former did not permit straight baselines to be drawn to and from drying rocks and shoals whereas the latter permitted such drying rocks and shoals to be taken as individual points of departure for measuring the territorial sea.⁶ In reply, François stated that draft Article 13 was concerned with the 'general rule' for measuring the territorial sea from the low-water mark whereas draft Article 6 was concerned with the 'exceptional cases' of deeply indented coasts.⁷

Sandström next remarked that it was difficult to reconcile draft Article 11, which defined an island as being 'permanently above high-water mark', with draft Article 13 which treated in the same way as islands certain rock formations which emerged only at low water.⁸ François, in reply, stated that it was only drying rocks and shoals situated within T miles of the coast that were 'virtually treated like islands' under the provisions of draft Article 13.⁹ Pal thereupon asked if the purpose of draft Article 13 was to make provision for drying rocks with a territorial sea of their own, or simply to enable such drying rocks to be used as individual points of departure for

¹ *Yearbook of the I.L.C.*, 2 (1954), p. 5.

² *Ibid.*, 1 (1954), p. 70.

³ *Ibid.*, p. 80.

⁴ *Ibid.*, p. 83.

⁵ *Ibid.*, p. 95. (François here observed that there was a discrepancy in the French text of the two provisions: draft Article 6 (2) used the term 'fonds affleurants à basse mer' whereas draft Article 13 spoke of 'rochers ou fonds, couvrants ou découvrants'; the English term 'drying rocks and shoals' used in draft Article 6 (2) was correct and the French text ought to read 'fonds couvrants et découvrants'. In answer to Lauterpacht, who thought that the term 'drying' was not clear, François remarked that the rocks and shoals in question 'sometimes were under water and at other times emerged and dried'; the term 'rocks awash' meant formations which were just awash at low tide.)

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*, p. 96.

measuring the territorial sea. It is clear that Pal was here thinking of straight baselines for he continued:

In the latter case, the logical place for the provision was either in, or immediately after, Article 6. Article 6, however, specifically laid down that drying rocks could not be used as such points of departure. It was therefore necessary to remove any possible inconsistency between the two articles.

... If drying rocks were to be acknowledged as having a territorial sea of their own, the Commission had to proceed with caution, as it would thus perhaps be extending existing prerogatives.¹

Although the Chairman thought that the point raised by Pal was a question for the Drafting Committee, François considered that much more than a question of drafting was involved. He continued:

Article 6 and Article 13 dealt respectively with two questions which were different in substance. The adoption of article 6 which forbade the drawing of straight base lines from rocks awash (*fonds affleurant à basse mer*), had nothing to do with the question whether drying rocks could be used as part of the normal base line. The normal base line being the line of low-water mark, and drying rocks being rocks which emerged at low-water, it followed, as stated in Article 13, that such rocks could be used in measuring the territorial sea. That provision of Article 13 would apply whether there were any straight base lines under Article 6 or not.²

Pal was not satisfied with this explanation. He pointed out that in the *Anglo-Norwegian Fisheries* case none of the drying rocks used as base points by Norway was more than four miles from the coast; if drying rocks, irrespective of their distance from the coast, were going to be given a territorial sea of their own, that would be tantamount to raising them to the status of islands, for which Pal could see no justification.³

At the Commission's 261st Meeting, held on 5 July 1954,⁴ Lauterpacht sought to amend draft Article 13 in order to make it clear that a State could use only those elevations which were situated within the territorial sea as measured from the land or from an island. François replied that his own formulation meant the same thing as the proposed amendment. Lauterpacht's proposal was defeated and draft Article 13, subject to redrafting by the Drafting Committee, was adopted by 9 votes to none, with 4 abstentions.

The Drafting Committee redrafted Article 6 which it renumbered as draft Article 5.⁵ Paragraph 1 sanctioned in exceptional cases a departure from the low-water mark baseline in the form of straight baselines 'joining appropriate points on the coast'; the sea areas enclosed thereby had to be sufficiently closely linked to the land domain to be subject to the regime of internal waters. Paragraph 2, as redrafted, ran in full as follows:

As a general rule, the maximum permissible length for a straight base line shall be ten miles. Such base lines may be drawn, when justified according to paragraph 1, between headlands of the coastline or between any such headland and an island less than five miles from the coast, or between such islands. Longer straight base lines may, however, be drawn provided that no point on such lines is more than five miles from the coast. Base lines shall not be drawn to and from drying rocks and shoals.

In its commentary on the redrafted article, the Commission stated that it had followed the Court's judgment as the basis for the text though it had taken account of the recommendations of the Committee of Experts as slightly modified; accordingly, in

¹ Ibid.

² Ibid.

³ Ibid.

⁴ Ibid., pp. 96-8.

⁵ Ibid., 2 (1954), pp. 154-5.

the words of the Commission, these latter additions 'represent a progressive development of international law.'¹

Draft Article 13, now renumbered 12, read in its redrafted form as follows:

Drying rocks and shoals which are wholly or partly within the territorial sea may be taken as points of departure for delimiting the territorial sea.²

In its commentary on this, the Commission wrote:

Drying rocks and shoals situated wholly or partly in the territorial sea are treated in the same way as islands. The limit of the territorial sea will accordingly make allowances for the presence of such drying rocks and shoals and will jut out to sea off the coast. Drying rocks and shoals, however, which are situated outside the territorial sea have no territorial sea of their own.

The Commission considers that the above article expresses the international law in force.

It was said that the terms of Article 5 (under which base lines are not drawn to or from drying rocks and shoals) might perhaps not be compatible with Article 12. The Commission does not consider them incompatible. The fact that for the purpose of determining the breadth of the territorial sea drying rocks and shoals are assimilated to islands does not imply that such rocks are treated as islands in every respect. If they were, then, so far as the drawing of base lines is concerned, and in particular in the case of shallow waters off the coast, the distance between base lines and the coast might conceivably be far in excess of that intended to be laid down by the method of these base lines.³

The draft articles as a whole were then sent to member States of the United Nations for comment. The Haitian Government considered that the reference to drying rocks and shoals in draft Article 12 should be deleted since 'it might lead to an excessive extension of the territorial sea; it is, in any case, incompatible with the provisions of the last paragraph of draft Article 5'.⁴ The Icelandic Government maintained that the restrictions set out in draft Article 5 (2) concerning, *inter alia*, the use of drying rocks and shoals, were contrary to the judgment of the International Court of Justice.⁵ The Norwegian Government, too, thought that the rules in draft Article 5 (2) 'on all points seem to constitute innovations unwarranted by the practice of States' and it pointed out that drying rocks and shoals had been used in its own coastal delimitation which was the very subject-matter of the Court's judgment.⁶

At its 316th Meeting, held on 21 June 1955, the International Law Commission considered a proposal by Garcia Amador to delete the whole of draft Article 5 (2).⁷ Amador, with whom Krylov and Hsu agreed, complained that the article as a whole omitted the consideration, stressed by the Court, of long-standing economic interests peculiar to a region. He agreed, furthermore, with the Norwegian Government's criticism of the 'innovations'. Amador suggested that paragraph 2 be deleted altogether and paragraph 1 redrafted to take account of the regional economic interests. The proposal to delete paragraph 2 was then adopted by 6 votes to 5, with 2 abstentions.⁸

At the 319th Meeting, held three days later, the Commission turned to the consideration of draft Article 12. Sir Gerald Fitzmaurice drew attention to the third paragraph of the commentary where reference had been made to the relationship between this draft article and the last sentence of draft Article 5 (2). He pointed out that the whole of paragraph 2 had now been deleted but that the provision prohibiting the drawing of straight baselines to or from low-tide elevations had been approved by

¹ *Yearbook of the I.L.C.*, 2 (1954), p. 155.

⁴ *Ibid.*, 2 (1955), p. 76.

⁷ *Ibid.*, 1 (1955), pp. 197-8.

² *Ibid.*, p. 156.

⁵ *Ibid.*

³ *Ibid.*

⁶ *Ibid.*, p. 52.

⁸ *Ibid.*, p. 200.

the Committee of Experts for reasons of a practical nature, namely that it was important for mariners to be able to see the points of departure for baselines at all times. He continued:

If the point of departure was a rock or shoal which was only visible at low tide, mariners might easily cross the baseline unawares.

There was, therefore, good reason for the sentence to which he had referred, and which had now been deleted.¹

Sandström commented that although Swedish law, in the same way, he believed, as the law of the other Scandinavian countries, allowed baselines to be drawn to and from drying rocks and shoals, he did not feel strongly about the question and would abstain from voting on it. Krylov wondered why the arguments advanced by Fitzmaurice were not considered by the latter to apply equally to draft Article 12. Fitzmaurice replied that the two situations were 'quite different'. Scelle agreed that the distinction between the two situations was justified, remarking: 'In its internal waters, a State took up an entrenched position, and they should therefore be restricted as much as possible.'²

Fitzmaurice's proposal to reintroduce the last sentence of the former paragraph 2 of draft Article 5 was then adopted by 4 votes to none, with 8 abstentions. The re-introduction was made by an addition to paragraph 1 of the same draft article, which, after redrafting, now read as follows:

Where circumstances necessitate a special régime because the coast is deeply indented or cut into or because there are islands in its immediate vicinity, or where this is justified by economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage, the base line may be independent of the low-water mark. In these special cases, the method of straight base lines joining appropriate points may be employed. The drawing of such base lines must not depart to any appreciable extent from the general direction of the coast and the sea areas lying within these lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters. Base lines shall not be drawn to and from drying rocks and drying shoals.³

At the Commission's 324th Meeting, held on 1 June 1955, draft Article 12 was adopted unanimously. It was once again renumbered, this time becoming draft Article 11.⁴

The draft articles as a whole were then again submitted to member States for comment. Norway suggested the deletion of the provision now in draft Article 5 (1) prohibiting the drawing of straight baselines to and from low-tide elevations because, in the Norwegian view, this had not appeared in the judgment of the International Court of Justice which had recognized the Norwegian system.⁵ At its next session, the Commission considered the draft articles in the light of the comments from States. On 11 June 1956, at the 364th Meeting, Sir Gerald Fitzmaurice stated:

With regard to the question of baselines drawn to and from drying rocks and drying shoals, the criticism that the Court had not mentioned that point was irrelevant; for neither, in not mentioning it, had it condemned the principle formulated in the article. The question had not arisen in the *Anglo-Norwegian Fisheries* dispute, for to the best of [the speaker's] recollection all the baselines had been drawn between terminal points that

¹ Ibid., p. 218.

² Ibid.

³ Ibid., 2 (1955), p. 36.

⁴ Ibid., 1 (1955), p. 252; 2 (1955), p. 38.

⁵ Ibid., 2 (1956), p. 69. See to the same effect, Evensen, 'Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos', *United Nations Conference on the Law of the Sea, Official Records*, vol. 1, pp. 289, 301.

were visible at all states of the tide.¹ Drawing a baseline amounted in effect to drawing a line across waters, which was not discernible except by reference to its terminal points. The only indication available to the mariner was a line on the chart, and the indication of terminal points was, therefore, essential. Moreover, they obviously must be visible at all states of the tide. The matter was one of great importance to shipping. There was no question of imposing any restrictions on the rights of the coastal State. In the majority of cases, there would always be a permanently uncovered terminal point near to a drying rock or a drying shoal. If that were not so, the rocks or shoals in question would be at such a distance from the coast as to have no relationship with the land, in which case, as the Court had indicated, such a point could not be chosen as terminal at all. The principle enshrined in the article was both valid in law and essential in practice.²

The Commission did not discuss this point further.

Draft Article 11 (low-tide elevations within the territorial sea may be taken as 'points of departure' for delimiting the territorial sea) was adopted at the 365th Meeting, held on 12 June 1956, the Chairman remarking that this draft article had already been disposed of in connection with draft Articles 4 and 5.³

In its report to the General Assembly on the work of its Eighth Session, the International Law Commission approved the following four draft articles relevant to the present discussion:⁴

Article 4

Subject to the provisions of article 5 and to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the low-water line along the coast, as marked on large-scale charts officially recognized by the coastal State.

Article 5

1. Where circumstances necessitate a special régime because the coast is deeply indented or cut into or because there are islands in its immediate vicinity, the baseline may be independent of the low-water mark. In these cases, the method of straight baselines joining appropriate points may be employed. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters. Account may nevertheless be taken, where necessary, of economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage. Baselines shall not be drawn to and from drying rocks and drying shoals.⁵

Article 10

Every island has its own territorial sea. An island is an area of land, surrounded by water, which in normal circumstances is permanently above high-water mark.

Article 11

Drying rock[s] and drying shoals which are wholly or partly within the territorial sea as measured from the mainland or an island, may be taken as points of departure for measuring the extension of the territorial sea.⁶

¹ The distinguished speaker's recollection was incorrect.

² *Yearbook of the I.L.C.* 1 (1956), p. 186.

³ *Ibid.*, p. 195.

⁴ *Ibid.*, 2 (1956), pp. 266-71.

⁵ In its commentary, the Commission remarked: 'Straight baselines may be drawn to islands situated in the immediate vicinity of the coast, but not to drying rocks and drying shoals. Only rocks or shoals permanently above sea level may be used for this purpose. Otherwise the distance between the baselines and the coast might be extended more than [is] required to fulfil the purpose for which the straight baseline method is applied; and, in addition, it would not be possible at high tide to sight the points of departure of the baselines'. *Ibid.*, p. 268.

⁶ In its commentary, the Commission remarked: '(1) Drying rocks and shoals situated wholly or partly in the territorial sea are treated in the same way as islands. The limit of the territorial

3. DISCUSSIONS IN THE FIRST UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 1958

The First United Nations Law of the Sea Conference opened at Geneva in February 1958. The question of the territorial sea and contiguous zone was entrusted to the First Committee under the chairmanship of K. Bailey of Australia.

At the 48th Meeting of the First Committee, held on 15 April 1958, the United Kingdom delegate, Sir Gerald Fitzmaurice, proposed an amendment to draft Article 5 whereby, *inter alia*, there would be a separate paragraph reading: 'Baselines shall not be drawn to and from drying rocks and drying shoals.'¹

At the 51st Meeting, held on 17 April 1958, the Swedish delegate, Petré, opposed the idea of this separate paragraph, stating that in Sweden baselines had for a long time been drawn to and from drying rocks and drying shoals.² The United Kingdom delegation thereupon accepted the Swedish view, an acceptance which, in the words of Bailey, 'met the requirements of a number of amendments, which, like that of Iceland . . . and of Norway . . . , proposed the deletion of the last sentence of the International Law Commission's Article 5, paragraph 1'.³

Although the Netherlands' and Italian delegations expressed their support for a provision similar to that contained in the United Kingdom amendment, the attention of the Committee returned to the last sentence of draft Article 5, paragraph 1 still before them. At its 52nd Meeting, held also on 17 April 1958, it rejected, by 27 votes to 18, with 20 abstentions, a proposal by Iceland and Norway to delete this sentence.⁴ It then adopted without debate by 35 votes to 13, with 18 abstentions, a Mexican amendment to modify the controversial last sentence to read as follows: 'Baselines shall not be drawn to and from rocks, shoals or other elevations which are above water at low tide only, unless lighthouses or similar installations which are permanently above sea level have been built on them.'⁵ The draft article as amended was then sent to the Drafting Committee which substituted the term 'low tide elevations' and constituted the above sentence as a separate paragraph 3 of draft Article 5.⁶

At the 60th Meeting of the First Committee, held on 22 April 1958, the United Kingdom delegation proposed to add a second paragraph to draft Article 11, to read: 'Drying rocks and drying shoals situated outside the territorial sea, as measured from the mainland or an island, have no territorial sea of their own.'⁷ Speaking on the proposal, Fitzmaurice stated that it was intended purely for clarification. He continued:

Drying rocks or shoals, being formations submerged in water for one-half of every twenty-four hours, clearly had no territorial sea of their own. That inference had to be

sea will make allowance for the presence of such drying rocks and will show bulges accordingly. On the other hand, drying rocks and shoals situated outside the territorial sea, as measured from the mainland or an island, have no territorial sea of their own. (2) It was suggested that the terms of Article 5 (under which straight baselines are not drawn to or from drying rocks and shoals) might be incompatible with the present article. The Commission sees no incompatibility. The fact that for the purpose of determining the breadth of the territorial sea drying rocks and shoals are assimilated to islands does not imply that such rocks and shoals are treated as islands in every respect. In the comment to Article 5 it has already been pointed out that if they were so treated, then, where straight baselines are drawn, and particularly in the case of shallow waters off the coast, the distance between the baseline and the coast might be far greater than that required to fulfil the purpose for which the straight baseline method was designed.' (Ibid., pp. 270-1).

¹ *United Nations Conference on the Law of the Sea, 1958, Official Records*, vol. 3, pp. 148, 228.

² Ibid., p. 156.

⁴ Ibid., pp. 160-1. The proposal did not thus obtain the required two-thirds majority.

⁵ Ibid., pp. 161, 239.

⁶ Ibid., vol. 2, p. 123.

⁷ Ibid., vol. 3, p. 228.

drawn from the International Law Commission's draft of Article 11 and also from the definition of islands in Article 10.¹

The United States also proposed an amendment to draft Article 11 as follows:

A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high-tide. The low-tide line on a low-tide elevation which is within T miles of a mainland or an island may be used as a baseline (T being the breadth of the territorial sea)².

Introducing the United States' proposal, the delegate, Dean, stated that he objected to the use of the terms 'rocks' and 'shoals' as irrelevant and vague. He also regarded the phrase 'points of departure' used in draft Article 11 as inadequate 'since a low-tide elevation, if extensive, could not be a point; moreover the phrase was confusing, for it might be interpreted to relate to the determination of the outer limit of the territorial sea, not to that of the baseline'.³

Voting on the United States' proposed amendment was taken first and it was carried by 25 votes to 5, with 27 abstentions. The United Kingdom proposal was then carried by 50 votes to 1, with 7 abstentions. Subject to the Drafting Committee's incorporation of the amendments, the draft article was then adopted without a vote.⁴

When the Conference moved into Plenary Session to consider the First Committee's report, Norway, at the 19th Plenary Meeting, held on 27 April 1958, called for a separate vote on paragraph 3 of draft Article 5, which prohibited the drawing of straight baselines to or from low-tide elevations unless lighthouses or other permanently emergent structures had been built on them. The motion was rejected by 29 votes to 20, with 16 abstentions.⁵ The Norwegian delegate thereupon observed that his delegation had been put into an embarrassing position by the paragraph in question, which, according to Norway, '... embodied a provision which was inconsistent with the decision taken by the International Court of Justice in 1951, when the Norwegian straight baselines had been recognized as based on certain low-tide elevations'.⁶ He stated that Norway would, with reluctance, vote for draft Article 5 as a whole, although he reserved his Government's right to consider in due course whether it would not be obliged to make a reservation to the paragraph in any future convention embodying such an article.

Draft Article 5 as a whole was then adopted by the Conference by 63 votes to 8, with 8 abstentions.⁷ It was renumbered as Article 4 of the final text of the Convention on the Territorial Sea and the Contiguous Zone which was adopted by the Conference on 27 April 1958.

Draft Article 11 was adopted without further discussion at the same Meeting by 77 votes to none,⁸ and became Article 11 of the Convention. Its full text now ran:

1. A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

¹ *United Nations Conference on the Law of the Sea, 1958, Official Records*, vol. 3, p. 186.

² *Ibid.*, p. 243.

³ *Ibid.*, p. 186.

⁴ *Ibid.*, p. 187.

⁵ *Ibid.*, vol. 2, p. 62; i.e. the required two-thirds majority was not obtained.

⁶ *Ibid.*, p. 63.

⁷ *Ibid.*

⁸ *Ibid.*, p. 64.

4. THE SCOPE OF PARAGRAPH 3 OF ARTICLE 4

The paragraph gives rise to a number of questions, six of which will now be considered.¹

- (i) *Does the paragraph now reflect a rule of general customary international law thus binding on all States whether or not they are Parties to the Convention?*

As described above, the paragraph was the outcome of a compromise proposal made by Mexico at a time when the First Committee of the 1958 Conference had revealed a difference of opinion amongst its members on the issue whether restrictions on the use of low-tide elevations in a straight baseline system should be deleted. There appears not to have been any history of State practice behind the Mexican proposal, the main argument in support of which was probably that it would not be unreasonable to mariners if it were adopted.² The Convention is in force for a minority of States only and even for a minority of coastal States. Furthermore, several States whose coasts would probably fall within the geographical scope of Article 4, e.g. Norway, Sweden, Iceland, Chile, Ireland, Canada, Greece, Turkey, New Zealand, are not Parties to the Convention. Moreover, some non-Party States have either continued contrary practices notwithstanding the Convention, e.g. Norway, Iceland, Saudi Arabia, or else have even adopted contrary practices since the Convention, e.g. Sweden by its 1966 delimitation. It is therefore submitted to be appropriate to adopt and adapt the words of the International Court of Justice in a recent pronouncement on another maritime issue:

... if the Geneva Convention was not in its origins or inception declaratory of a mandatory rule of customary international law ... , neither has its subsequent effect been constitutive of such a rule; and that State practice up-to-date has equally been insufficient for the purpose.³

- (ii) *Does the paragraph necessarily apply to all circumstances in which a straight baseline system, consistent with the rules of international law, may be used?*

Article 4 (1) refers to only two types of locality: (a) where the coast line is deeply indented and cut into; (b) where there is a fringe of islands in the immediate vicinity of the coast line. It may stretch the Article beyond its ordinary meaning, therefore, if it were applied *proprio vigore* to other types of locality, e.g. to a group of islands not situated in the immediate vicinity of a mainland coast. Professor Sørensen was of this opinion. Writing shortly after the Convention had been drawn up, he stated:

... this Article [i.e. Article 4] does not apply to archipelagos which do not satisfy the geographic criteria set forth in the article, in particular the situation in the immediate

¹ It is not proposed here to discuss the very real problem of the meaning of the terms 'low-tide' and 'high-tide' in the relevant Articles. For the United Kingdom, the Territorial Waters Order in Council 1964 (Statutory Instruments 1965, Part III (section 2), p. 6452A) has defined a 'low-tide elevation' as 'a naturally formed area of drying land surrounded by water which is below water at mean high-water spring tides'. For a discussion of this interpretation see *Post Office v. Estuary Radio Ltd.*, [1967] 2 Lloyd's Rep. 34, 45-8 per O'Connor J. A general discussion of the practical problems may be found in Shalowitz, *Shore and Sea Boundaries* (1962-64), 2 vols.

² In British practice the usual problem was whether such a feature carried its own belt of territorial waters. On 16 March 1907, the Law Officers, Walton and Robson, thought that in principle the United Kingdom could claim a radius of three miles territorial jurisdiction around the Eddystone Rock, a low-tide elevation 14 miles from the coast and on which stood a substantial permanent lighthouse. They advised against such a claim's being made in practice. (Public Record Office reference 834/22; Foreign Office Confidential Print 9263, Opinion No. 12.)

³ *North Sea Continental Shelf cases*, I.C.J. Reports, 1969, pp. 3, 45.

vicinity of a main coast. What are sometimes called 'mid-ocean archipelagos' are therefore not covered by this article, nor by any other article of the Convention, and it remains henceforth, as it was before the Geneva Conference, an open question, how the territorial sea shall be measured in the case of such archipelagos.¹

If this view is correct, and it is submitted respectfully that it is, the question then arises whether a system of straight baselines may ever validly be drawn outside the circumstances set out in paragraph 1, particularly in the case of 'mid-ocean' archipelagos. In its pleadings in the *Fisheries* case, Norway argued that there was a particular regime for delimiting the internal waters of archipelagos, both coastal and oceanic, although it pointed out that only the coastal type was at issue in the case before the Court.² The Court for its part confined its remarks to the coastal island fringe situation. Despite consideration by the International Law Commission and the efforts of certain States during the 1958 Conference, no provision specifically referring to mid-ocean archipelagos found its way into the Convention. However, in an article completed in 1971 but not published until mid-1973, Professor O'Connell has gained assistance from the 1951 Judgment, of which he says

[It] cannot but be regarded as emancipating the archipelago question from the confines of precise limits, specific shape and abstract definition in which all previous discussion has sought to enmesh it, and as liberalizing in this case, as in other cases of the delimitation of the territorial sea, the whole structure of legal evolution.³

Part of this article in its unpublished form was available to the Observer of the newly independent State of Fiji at the 1971 summer session of the United Nations Seabed Committee.⁴ In a statement read to the Committee, on 26 July 1971, he declared:

Whilst the judgment of the Court in the case applied to coastal archipelagos, the Fiji Government submits that the principles utilized by the Court should not be confined only to coastal archipelagos but are of equal application to mid-ocean archipelagos. For example, the condition that a baseline must not depart to any appreciable extent from the general direction of the coast is of equal application to mid-ocean archipelagos if it is recognised that this is in itself merely a method of expressing the requirement for an intrinsic relationship between a line of natural features and the land to which these features form a barrier. The essence of the mid-ocean archipelago thereby is that such a relationship exists between the features themselves so that the situation is analogous to that of a complex coast of a continental country. A group of islands cannot be considered as an archipelago without a centripetal emphasis giving coherence to the group as a whole and expressing itself as an outer periphery which is the equivalent of the general direction of the coast as applied to coastal archipelagos.

It is accordingly submitted that the rules applicable to coastal archipelagos are of equal application to mid-ocean archipelagos, and that the effect of the judgment of the Court was to emancipate the entire archipelagic question from the confines of precise limits and shapes and from the abstract definition into which all previous discussions on the question has sought to retain it.⁵

¹ Sørensen, 'The Territorial Sea of Archipelagos', *Varia Juris Gentium, Liber Amicorum J. P. A. François* (1959), p. 316.

² *Anglo-Norwegian Fisheries case, I.C.J. Pleadings*, vol. 1, pp. 466, 495.

³ O'Connell, 'Mid-Ocean Archipelagos in International Law', this *Year Book*, 45 (1971), pp. 1, 16.

⁴ Full title: United Nations Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction.

⁵ A summary of the statement appears in U.N. Doc. A/AC. 138/SR. 62, pp. 9-17; the extract quoted above has been taken from the complete text.

Fiji, together with Indonesia, Mauritius and the Philippines, has put forward to the United Nations Seabed Committee draft articles on mid-ocean archipelagos which reflect the above considerations. The draft, which was tabled in August 1973,¹ provides for straight baselines to join 'the outermost points of the outermost islands and drying reefs'. It then states:

Baselines shall not be drawn to and from low-tide elevations unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.

The draft in addition expressly provides that the baselines 'shall not depart to any appreciable extent from the general configuration of the archipelago'.

(iii) *In circumstances where Article 4 applies, may straight baselines be drawn to and from low-tide elevations not having lighthouses or similar permanently emergent installations provided the elevation is situated within the breadth of the territorial sea measured from permanently dry land?*

This was the factual situation in the *Anglo-Norwegian Fisheries* case and its validity was thought by the Court to have been conceded by the United Kingdom. It is clear from the *travaux préparatoires* discussed earlier in this paper that it was not the intention of the International Law Commission to 'rubber-stamp' the Court's conclusion on this point, but rather to depart from it for reasons of practical utility and as recommended by the Committee of Experts.² The Mexican compromise proposal in the First Committee of the 1958 Conference was equally not intended to restore the effect of the Judgment but rather to put forward a rule quite independent of it. However, in an analysis of the 1958 Conventions written shortly after their adoption, Sir Gerald Fitzmaurice mentioned a possible argument to the effect that the restriction in Article 4 (3) should be read as inapplicable to low-tide elevations situated within the breadth of the territorial sea, or otherwise the paragraph would be incompatible with Article 11 (1) which permits such elevations to be used for measuring the breadth of the territorial sea. Fitzmaurice answered this argument as follows:

This, however, is not the case, and there is no contradiction. It is one thing to permit the use of a low-tide elevation to create *in its immediate vicinity* a moderate bulge in what is already territorial sea. But the effect is of quite another kind, and on an altogether different scale, if such elevations (even if within the territorial sea) can be used as departure points for what may be far-flung baselines ranging perhaps thirty, forty, or sixty miles. This would not only cause very extensive increases in territorial sea (and not merely in the immediate vicinity of the low-tide elevation concerned, but at a great distance from it): it would also create entirely new zones of *internal* or national waters out of what was formerly territorial sea, or even (in certain extreme cases) high seas. There is consequently no comparison or real analogy between the two cases.³

Despite these criticisms, however, a similar rule has been suggested by the Four-Power draft in respect of mid-ocean archipelagos and a future conference on the law

¹ United Nations Doc. A/AC. 138/SC. II/L. 48, reproduced in *International Legal Materials* 12 (1973), p. 1263. This draft (Four-Power draft) is more precise on the issue under discussion than the archipelagic proposal made by the United Kingdom to the same session of the Committee. The latter draft provides for straight baselines drawn 'around the outermost points of the outermost islands' of the archipelago. United Nations Doc. A/AC. 138/SC. II/L.44, reproduced *ibid.*, p. 1259.

² See above, pp. 413-14.

³ Fitzmaurice, 'Some Results of the Geneva Conference on the Law of the Sea', *International and Comparative Law Quarterly* 8 (1959), pp. 73, 87. Original emphasis.

of the sea may well consider re-drafting Article 4 (3) to permit straight baselines to be drawn in analogous coastal circumstances.

- (iv) *In circumstances where Article 4 applies, may straight baselines be drawn to and from low-tide elevations having lighthouses or similar permanently emergent installations if the elevation is situated outside the breadth of the territorial sea measured from permanently dry land?*

No clear answer can be given. In the *Anglo-Norwegian Fisheries* case Norway submitted that the United Kingdom's objection to such a situation was 'arbitraire et sans fondement'¹ but as this was not in fact the situation before the Court it refrained from pronouncing upon its validity. It might be argued that a straight baseline drawn to such a feature outside the breadth of the territorial sea measured from permanently dry land would be departing from the 'general direction of the coast' or might lead to the enclosing of sea areas which were not 'sufficiently closely linked to the land domain'. Either of these results would invalidate the delimitation by virtue of paragraph 2 of Article 4, whatever the literal meaning of paragraph 3 might be. Once again, this is a topic which could reasonably be committed to a future conference called to re-shape the law of the sea.

- (v) *In circumstances where Article 4 applies and straight base lines are drawn, may a low-tide elevation with a permanently emergent installation situated on the seaward side of the baseline and within the breadth of the territorial sea measured from that line be used for constructing an extension of the territorial sea? In other words, does such a feature produce a bulge in the outer limit of the territorial sea?*

In his final conclusions, the United Kingdom Agent submitted to the Court in the *Anglo-Norwegian Fisheries* case:

That, where there is a low-tide elevation situated within 4 sea miles of permanently dry land, or of the proper closing line of Norwegian internal waters, the outer limit of Norwegian territorial waters may be 4 sea miles from the outer edge (at low tide) of this low-tide elevation. In no other case may a low-tide elevation be taken into account.²

At first glance it might appear that the United Kingdom was arguing in favour of an affirmative answer to the above question. But since, as submitted earlier, the United Kingdom must have considered that straight baselines could never be drawn to and from low-tide elevations it could not therefore have been advancing such a view. In fact, the context makes it clear that the Agent was referring to the closing line in bays and analogous features.

A further argument in favour of an affirmative answer, however, might be to submit that the situation falls within Article 11 (1) which has the effect of permitting a low-tide elevation (with or without permanently emergent installation) to create a bulge in the outer limit of the territorial sea if the feature is situated wholly or partly at a distance not exceeding the breadth of the territorial sea measured 'from the mainland or an island'. But the question posed above is whether that distance can be measured not from the mainland or an island but from a straight baseline. Article 11 (1), therefore, seems inapplicable to the situation.

Since there does not appear to be any positive conventional rule to justify such a delimitation and as the 'normal baseline' is stated in Article 3 to be the low-water line along the coast, it is therefore submitted that such a delimitation is invalid.

¹ *I.C.J. Pleadings*, vol. 3, p. 84.

² *Ibid.*, vol. 4, p. 457, emphasis added.

(vi) *In circumstances where Article 4 applies, is there any restriction as to the time at which the lighthouse or similar installation has to be in situ?*

The *travaux préparatoires* give no help here. In his post-Conference analysis, Sir Gerald Fitzmaurice, however, wrote of the obvious 'possibilities of abuse' if the objects were not already *in situ* 'at the date of the Convention'.¹ This wording, with respect, is unclear. Would the date be when the Convention was adopted (27 April 1958), the date when it was opened for signature (29 April 1958), the date when it was signed by any particular State, the date when it was ratified or acceded to by any particular State, or the date when it entered into force as an instrument (10 September 1964)? It is submitted with diffidence that the only proposition which can be asserted with confidence is that a straight baseline cannot validly be drawn to a low-tide elevation before any installation is constructed thereon; an installation must already be *in situ*. This, however, would not necessarily prevent a State from erecting permanently emergent structures on low-tide elevations and thereafter promulgating a system of straight baselines to link them together; whether a concept of bad faith in the light of the Convention's object and purpose² could be applied to invalidate such a delimitation remains uncertain.

5. CONCLUSION

The above six questions, together with others not discussed,³ make it clear that paragraph 3 of Article 4 may require more careful attention at the Third United Nations Conference on the Law of the Sea than it received at the 1958 Conference. Article 4 is in fact concerned with the extent of *internal* waters, not with the extent of territorial sea. This distinction, it has been submitted, was lost sight of by the United Kingdom in the *Anglo-Norwegian Fisheries* case. Its minor concession there as to the method of constructing the outer limit of the territorial sea was expressed in such ambiguous terms that it was interpreted by the Court as a concession as to the method of constructing the outer limit of internal waters. It is unlikely, however, that a similar confusion will arise at any future conference called upon to redraft the law of the sea. Indeed, the conflict of interests between, on the one hand, coastal States anxious to possess the fullest possible legal measure of control over the waters immediately adjacent to their shores, and, on the other hand, States protecting shipping interests anxious to preserve rights of passage through the last drop of water may make what seems a trivial and technical matter one for complex and hard-fought negotiation.⁴

¹ Fitzmaurice, loc. cit. (above, p. 421 n. 3), p. 86.

² See Article 31 (1) of the Vienna Convention on the Law of Treaties, 1969.

³ e.g. what is an installation 'similar' to a lighthouse?

⁴ Article 5 (2) of the 1958 Convention at present tempers the wind to the shorn lamb by providing that where the establishment of a straight baseline in accordance with Article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as elsewhere defined in the Convention, shall exist in those waters.

DECISIONS OF BRITISH COURTS DURING 1972-1973 INVOLVING QUESTIONS OF PUBLIC AND PRIVATE INTERNATIONAL LAW

A. PUBLIC INTERNATIONAL LAW*

Jurisdiction—criminal law—conspiracy entered into abroad to import dangerous drugs

Case No. 1. Director of Public Prosecutions v. Doot [1973], A.C. 807, H.L. In this appeal the point of law set before the House of Lords was whether an agreement made outside the jurisdiction of the English courts to import a dangerous drug into England and carried out by importing it into England was a conspiracy which could be tried in England. The statutory offences concerned with importation of drugs arose under section 2 of the Dangerous Drugs Act 1965 and sections 45 and 304 of the Customs and Excise Act 1952.

Their lordships allowed the appeal by the Director of Public Prosecutions and held that the offence charged was triable in England. The reasons for so holding related substantially to the nature of conspiracy in the common law and included the proposition that a conspiracy is complete when the agreement is made but continues so long as the parties to the agreement intend to carry it out. The argument for the respondents was to the effect that the initial agreement was made abroad and, though subsequent overt acts took place within the jurisdiction, the mature conspiracy took place outside it.

The reasoning of their lordships assumes that the conclusion as to jurisdiction depends upon the definition of the offence. There is no essential element in this manner of proceeding. Certainly, it is a common judicial approach. Independent considerations concerning State relations and jurisdiction in a wider context, if they appear at all, tend to take the modest form of inquiring whether rules of comity prohibit the particular instance of jurisdictional reach (as decided in terms of English Law). In the present case Lord Salmon (pp. 834-5) expressed the view that the charge concerned would not violate 'the rules of international comity'. There is much to be said for the view that the English courts should treat the issue of jurisdiction as a matter independent of reference to the definition of the crime concerned, supplemented by a mild inquiry into the rules of comity. If there had been no overt acts in England then the issue would have been posed in a form unsuited to the approach by way of the definition of the crime (the issue is referred to by Lord Wilberforce, at p. 818).

In the present appeal Lord Wilberforce (at p. 817) was prepared to invoke positive principles of jurisdiction on the basis of public international law and as a source of a *right* to exercise jurisdiction. Of course, the condition of criminality under English law has to be satisfied. However, reference to the issue of jurisdiction as a separate item, consisting of positive principles, and helpful observations on the somewhat question-begging character of 'territoriality', are very welcome. Lord Wilberforce set out his views as follows:

The basis of the Court of Appeal's judgment, the starting point of legal discussion in this case, is the proposition that all crime is territorial. In following this principle derived from the *Digest* and modernised by Huber, common law jurisdictions have been

* © Dr. Ian Brownlie, 1974.

consistent—more so, I believe, than systems of the civil law. It has been applied both as a principle for the construction of statutes (e.g. *Macleod v. Attorney-General for New South Wales* [1891] A.C. 455) and as a principle determining the reach of the common law. It has also a reflection in disputes between States, where international law is concerned. The present case involves international elements—the accused are aliens and the conspiracy was initiated abroad—but there can be no question here of any breach of any rules of international law if they are prosecuted in this country. Under the objective territorial principle (I use the terminology of the Harvard Research in International Law) or the principle of universality (for the prevention of the trade in narcotics falls within this description) or both, the courts of this country have a clear right, if not a duty, to prosecute in accordance with our municipal law. The position as it is under international law is not, however, determinative of the question whether, under our municipal law, the acts committed amount to a crime. That has to be decided on different principles. If conspiracy to import drugs were a statutory offence, the question whether foreign conspiracies were included would be decided upon the terms of the statute. Since it is (if at all) a common law offence, this question must be decided upon principle and authority.

In the search for a principle, the requirement of territoriality does not, in itself, provide an answer. To many simple situations, where all relevant elements occur in this country, or, conversely, occur abroad, it may do so. But there are many 'crimes' (I use the word without prejudice at this stage) the elements of which cannot be so simply located. They may originate in one country, be continued in another, produce effects in a third. Some constituent fact, the posting or receipt of a letter, the firing of a shot, the falsification of a document, may take place in one country, the other necessary elements in another. There is no mechanical answer, either through the Latin maxim or by quotation of Lord Halsbury L.C.'s words in *Macleod v. Attorney-General for New South Wales* [1891] A.C. 455, or otherwise, which can solve these. The present is such a case.

Extradition—offence of a political character

Case No. 2. Cheng v. Governor of Pentonville Prison [1973], A.C. 931, D.C. and H.L. The Supreme Court of New York had convicted the applicant of the attempted murder in New York of the Vice-Premier of the Nationalist Government seated in Taiwan (Formosa). Subsequently, the applicant fled to Sweden. In 1972 Sweden acceded to a request for extradition to the United States: in the course of the journey he fell ill and landed at London Airport. The applicant was detained by virtue of the Aliens Order 1953 and later pursuant to an order of the Chief Metropolitan Magistrate pending his surrender to the United States authorities. The order of committal under the Extradition Act 1870 was challenged by means of an application for a writ of habeas corpus. The basis of the application was that the offence for which extradition was sought was an offence of a political character within section 3 (1) of the Extradition Act.

The facts of the offence of which the applicant was convicted in New York State involved a demonstration, in which the applicant took part, set on foot by an organization of Formosans opposed to the existing regime in Taiwan. The object of the demonstration was the vice-premier of the Chinese Nationalist Government who was visiting the State of New York.

The Divisional Court relied upon passages in the speeches of Lord Reid and Viscount Radcliffe in *Reg. v. Governor of Brixton Prison, ex parte Schtraks* [1964], A.C. 556,¹ in which the 'offence of a political character' is based upon the concept of a fugitive at odds with the State applying for his extradition on some issue connected

¹ *This Year Book*, 38 (1962), p. 476.

with the political control or government of that country. Since the applicant was not at odds with the requesting State, the United States, his offence did not satisfy this test. The applicant appealed without success. Three of their lordships (Lords Hodson, Diplock and Salmon) agreed with both the decision and the reasoning of the Divisional Court. Thus the general effect of *Cheng* is to provide clear affirmation of the tests laid down, principally by Viscount Radcliffe, in *Schtraks*, whilst applying those tests in a situation not considered in that case.

The minority, consisting of Lord Simon of Glaisdale and Lord Wilberforce (who agreed with the former's speech), were firmly of the opinion that the correct construction of section 3 (1) of the Extradition Act could not involve confining the words to an offence 'against the foreign state demanding such surrender'. In the course of careful elaboration of the issue of statutory construction Lord Simon of Glaisdale¹ referred to the presumption in favour of conformity with international law. He relied, *inter alia*, upon the decision of the Court of Appeal in *Turin in In re Pavelic and Kwaternik*,² for the view that international law would preclude the appellant's extradition, just as it precluded Pavelic's extradition from Italy for the alleged murder of King Alexander in France. His lordship pointed out that in *Schtraks* the Law Lords were not confronted with the problem to be faced in the present appeal. Thus the minority in *Cheng* were not disagreeing with the tests laid down in general terms in *Schtraks* but rather with the incidence of such tests. Lord Simon of Glaisdale was conscious of the need to combat terrorism but he was of the view that the solution lay in political action by governments: 'there is no advantage in marginal and anomalous judicial erosion of traditional immunities'.³

Sovereign immunity—provincial government—Banco Provincial de Salta

Case No. 3. Swiss Israel Trade Bank v. Government of Salta and Banco Provincial de Salta (1972), 1 Lloyd's Rep. 497, McKenna J. In *Mellenger v. New Brunswick Development Corporation*⁴ the Court of Appeal held that the Corporation was an agency attracting sovereign immunity, and expressed the view that if the Corporation had carried on any 'ordinary trade or commerce' immunity would not have been recognized. The present case raises similar and equally important issues. The plaintiffs were the holders of bills of exchange drawn by a Liechtenstein corporation. The defendants were sued as acceptors of the bills which had been dishonoured on presentation.

The first defendant was either a part of the Government of the Argentine Republic, or at least a department of that Government, and immunity was granted accordingly. It was the status of the Bank, as second defendant, which was problematical. The Bank was constituted by an enactment of the Provincial Legislature in Salta in which the Bank was described as 'an autarchic entity of the Provincial Government, having as its aims the co-ordination of its activities with the economic and social policies of the Province'.

His lordship held that the Bank was not covered by sovereign immunity since it was 'an independent corporation carrying on an ordinary banking business free of Government control'. The decision of the Court of Appeal in *Baccus S.R.L. v. Servicio Nacional del Trigo*⁵ was explained on the basis that the defendants in that case had functions which were those of a department of State since they were under a duty to obey the Ministry's directions. His lordship regarded independence and not legal autonomy as

¹ At pp. 955-7.

² *Annual Digest*, 1933-4, p. 372, Case No. 158.

³ At pp. 959-60.

⁴ *This Year Book*, 45 (1971), p. 396.

⁵ [1957], 1 Q.B. 438.

the ultimate test: the Servicio del Trigo was a separate entity but lacked independence. The position of the New Brunswick Development Corporation in the *Mellenger* case was to be regarded in the same light. McKenna J. thus addressed himself to the question, did the Bank act on behalf of the State? and, since the answer to that inquiry was in the negative, was not bound to approach the logically separate issue of immunity in respect of 'ordinary commercial transactions'. Indeed, his lordship took the view that it was not open to him to embark on such an inquiry. Dr. Mann¹ has remarked that 'if the second defendant's case had prevailed, almost every government-owned and certainly every central bank would have been entitled to immunity'.

IAN BROWNLIE

B. PRIVATE INTERNATIONAL LAW*

Staying actions and the doctrine of forum non conveniens

Case No. 1. The learned editor of Dicey and Morris, *The Conflict of Laws*, writes in the ninth edition, '... it has been contended that English law has a doctrine of *forum non conveniens* comparable in scope and vitality to the Scottish and American doctrines. It is submitted that this contention is quite unfounded and that no such general doctrine is known to English law.'² It is, of course, not disputed that an English court has an inherent jurisdiction to stay an action in England or to restrain by way of injunction the institution or continuation of proceedings in a foreign court. The problem often arises when simultaneous actions are pending or anticipated in England and in a foreign country between the same parties on the same subject matter. Even here the jurisdiction to stay or enjoin is discretionary, and it is to be exercised exceedingly sparingly. The Court of Appeal, Dr. Morris points out,³ 'has emphatically re-asserted the principle that, in order to justify a stay, a mere balance of convenience is not enough: it must be shown that to allow the action to continue would be oppressive and vexatious to the defendant and that to stay it would not cause an injustice to the plaintiff. In both, the burden of proof is on the defendant'. One of the two⁴ Court of Appeal cases cited is *The Atlantic Star*.⁵ The House of Lords has now, perhaps somewhat unexpectedly, reversed this decision by a majority of three to two, two of the majority being Scottish Lords of Appeal.⁶

The case arose out of the arrest in an English port of a Dutch vessel belonging to the appellants, who were Dutch shipowners. The respondents were a Dutch company which owned a barge that had been sunk in Belgian waters in collision with the arrested vessel and they claimed damages. The appellants sought a stay of the action in England on the grounds that the Belgian court, where proceedings had already been commenced by the respondents, was the proper forum to deal with the claim.

Brandon J. refused to stay the action, and this was upheld by the Court of Appeal (Phillimore L.J. *dubitante*). The House of Lords allowed the appellant's further appeal. Although their Lordships divided, it was generally conceded that, as the trial judge had found, 'so far as convenience is concerned, the Commercial Court of Antwerp is by far the more appropriate forum'. Brandon J.⁷ had given several reasons for this

* © P. B. Carter, 1974.

¹ *Modern Law Review*, 36 (1973), p. 18 at p. 20.

² Dicey and Morris, *The Conflict of Laws* (9th ed., 1973), p. 219.

³ *Ibid.*, 220.

⁴ The other is *Maharanee of Baroda v. Wildenstein* [1972] 2 Q.B. 283.

⁵ [1973] Q.B. 364.

⁶ [1973] 2 W.L.R. 795.

⁷ [1972] 1 Lloyd's Rep. 534, 539

finding, including the place of collision, the fact that the case was governed by Belgian law and local regulations, the fact that five other claims arising out of the collision were pending in Antwerp, and the fact that full security had been offered by the appellants there. He had also said: 'the case has absolutely no connection with England, except that, because the defendants' ship trades from time to time in an English port, she is liable to arrest here'.¹ Even the majority in the House of Lords accepted, however, that convenience is not the sole criterion in exercising the discretion to stay. Furthermore, it was conceded that the doctrine of *forum non conveniens* is not established in England as it is in Scotland. Any attempt to eliminate the difference between the attitudes of the two jurisdictions was overtly disclaimed. Indeed, Lord Kilbrandon, while pointing out that the proper translation of 'conveniens' is not 'convenient' but 'appropriate', said that there may 'be a good reason for a significant difference between the two practices. In a large proportion of the cases in Scotland in which the plea has been taken, the case has come before the Scottish court by the exercise of what is widely recognized as an exorbitant jurisdiction, namely, that founded by arresting the moveable property in Scotland of a foreigner'.²

The traditional English approach, as reflected in *Dicey and Morris*³, was classically stated by Scott L.J. in *St. Pierre v. South American Stores Ltd.*⁴ '(1) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English court if it is otherwise properly brought. The right of access to the King's court must not be lightly refused. (2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.' Lord Wilberforce, a member of the majority in *The Atlantic Star*, cited and accepted Scott L.J.'s statement but continued, 'But too close and rigid an application of it may defeat the spirit which lies behind it. And this is particularly true of the words "oppressive" and "vexatious". These words are not statutory words: as I hope to have shown from earlier cases they are descriptive words which illustrate but do not confine the court's general jurisdiction. They are pointers rather than boundary marks.'⁵ Lord Reid, another member of the majority, said of English law, 'The existing basis is that the plaintiff must not be acting vexatiously, oppressively or in abuse of the process of the court. These are flexible words and I think that in future they should be interpreted more liberally.'⁶ Lord Kilbrandon, the third member of the majority, accepted Scott L.J.'s formulation as a 'guide' to the court when exercising its discretion to stay, but took the view that the words 'oppressive' and 'vexatious' must be treated as 'morally neutral'. His Lordship included, amongst the factors in the instant case that satisfied him that the continuance of the case in England would be oppressive or vexatious to the defendants, the competing claims of the Belgian court, the convenience of witnesses and parties, the unnecessary expense to which the English action would subject the appellants and the total absence of physical connection between England and the subject matter of the action. Moreover, he derived support in his conclusion from the trial judge's finding that 'as far as convenience is concerned, the Commercial Court at Antwerp is by far the most convenient forum'.⁷

¹ *Ibid.*, 539.

² [1973] 2 W.L.R. 795, 820.

³ See above, p. 428, n. 2.

⁴ [1936] 1 K.B. 382, 398.

⁵ [1973] 2 W.L.R. 795, 813.

⁶ *Ibid.*, 800.

⁷ *Ibid.* 822.

Reading the three majority judgments in *The Atlantic Star*, it is difficult to resist the conclusion that, although lip service has been paid to old formulations, a marked change has been effected. This change is not limited to treating particular words more liberally, nor is it one merely of emphasis. Lord Wilberforce is not simply broadening the meaning of the crucial words 'oppressive' and 'vexatious', he is fundamentally altering their role in Scott L.J.'s formulation. They no longer delimit a jurisdiction; they now merely illustrate it. Again, whereas Scott L.J.'s rule expressly places a burden upon the defendant to prove a negative, namely, that a stay would not cause an injustice to the plaintiff, both Lord Reid and Lord Wilberforce treat the problem as being to some extent one of balancing the interests of both parties. The former said: 'The position of the defendant must be put in the scales',¹ and the latter: 'I think, too, that there must be a relative element in assessing both advantage and disadvantage—relative to the individual circumstances of the plaintiff and defendant.'²

The majority judgments, especially that of Lord Kilbrandon, are overcast by the shadow of the notion of the objectively appropriate forum. Indeed, one gets the clear impression that, as the dissentient Lord Simon of Glaisdale pointed out, there has been a move 'to admit by the back door a rule that your Lordships consider cannot be welcomed at the front'.³ The wheel of history has turned a full circle if resort is being had to what in effect is a legal fiction in order to *deprive* the court of jurisdiction.

A real need for a doctrine of *forum non conveniens* connotes deficiency in the drafting of jurisdictional rules. It is an admission of the unwarranted width of such rules. The doctrine bestows a discretion to mitigate the effects of this deficiency in particular cases. The exercise of this discretion involves the balancing of diverse and unquantifiable objective factors of 'appropriateness'. The time may well be ripe for a critical reappraisal of English jurisdictional rules. Such a re-examination is to be preferred to the introduction (even if it be clandestine) of a doctrine which in effect makes the taking of jurisdiction in part discretionary. It is not essential that jurisdictional rules should be simple, but it is highly desirable that they be certain.

The justification for the traditional power of English courts to stay actions is based on a very different ground. A court must have an ultimate discretion to prevent its process from being abused: this must be so, whatever the courts' jurisdictional rules, and regardless of whether those rules are formulated with precision and sophistication or reliance is placed upon a doctrine of *forum non conveniens* as a safeguard against the effects of their shortcomings.

Foreign penal nationality laws

Case No. 2. In *Oppenheimer v. Cattermole*⁴ the Court of Appeal had to consider the effect in England of a German law passed in 1941 which provided that 'A Jew whose usual place of abode is abroad may not be a German citizen . . . A Jew loses German citizenship if, at the date of entry into force of this regulation, he has his usual place of abode abroad.'

A taxpayer, a German Jew, had emigrated to England in 1939 as a result of Nazi persecution and had in 1948 become a naturalized British subject. From 1953 onwards he was paid an annual pension by the Federal German Republic. He claimed exemption from United Kingdom tax on this pension during the years 1953-68 under a double taxation agreement on the ground that he had dual British and German nationality.

¹ [1973] 2 W.L.R. 795, 801.

² *Ibid.*, 814.

³ *Ibid.*, 818.

⁴ [1973] 1 Ch. 264.

There was no doubt that he had acquired British nationality: the question was as to whether he had been deprived of German nationality.

The Court accepted the established principle that whether a person is a national of a country must be determined by reference to the municipal law of that country. Buckley L.J. cited with approval the words of Russell J. in *Stoeck v. Public Trustee*: 'Whether a person is a national of a country must be determined by the municipal law of that country. Upon this I think all text writers are agreed. It would be strange if it were otherwise. How could the municipal law of England determine that a person *is* a national of Germany? It might determine that for the purposes of English municipal law a person shall be deemed to be a national of Germany, or shall be treated as if he were a national of Germany, but that would not constitute him a national of Germany, if he were not such according to the municipal law of Germany. In truth there is not and cannot be such an individual as a German national according to English law. . . .'¹ Buckley L.J. found the reasoning in this passage 'unanswerable',² and both he and Orr L.J. accordingly held that whether the taxpayer had German nationality (and thus in the circumstances dual nationality) was a question of fact to be determined by reference to German municipal law. There was no doubt on the evidence that by German law the taxpayer had lost his German nationality in 1941.

Lord Denning M.R., however, although citing the first two sentences of the passage from Russell J.'s judgment, quoted above, took the view that it had no applicability to the instant case. The Master of the Rolls drew a distinction between the determination of nationality and the determination of dual nationality: 'If a man is a British national, owing allegiance here, it is for the English law to say whether he can, consistently with that allegiance, be also a national of another country, owing allegiance to that other country also. I turn therefore to see whether English law does recognize the taxpayer as having, by English law, *dual* nationality.'³ Lord Denning M.R. went on to hold that when the taxpayer became a British subject in 1948 he was treated by English law as having a single nationality. It is submitted with respect that some undesirable anomalies could arise from this general approach. For example, a person could be a national of country X and simultaneously a national of country Y, but not have dual nationality by the law of either X or Y. Or he might have dual nationality by the law of one but not by the law of the other. To treat possession of dual nationality as something distinct from possession of two nationalities must lead to difficulty.

However, for an English court to hold that a person, although having two nationalities is *deemed* not to have dual nationality for the purposes of a particular statutory provision would, of course, be a very different matter, and analogous to the position put by Russell J. in the passage from his judgment in *Stoeck v. Public Trustee* cited by Buckley L.J.

Applying traditional doctrine Buckley and Orr L.JJ. held that by German law the taxpayer had lost his German nationality in 1941. It was, however, contended that the German law of 1941 ought to be disregarded on two grounds: (1) that it was penal or confiscatory and (2) that for reasons of public policy English law will not recognize in respect of an enemy alien any change of his nationality effected by his domestic law in time of war. Both arguments were rejected. Buckley and Orr L.JJ. held, and in this the court was probably making new law, that the principle of non-recognition of foreign penal and confiscatory laws does not apply to laws relating to the determination of nationality or citizenship. There was here in fact a clash between two established rules of law. It was held, rightly it is respectfully submitted, that the basis of the rule that

¹ [1921] 2 Ch. 67, 82.

² [1973] 1 Ch. 264, 273.

³ *Ibid.*, 270.

a country can determine who are, and who are not, its nationals is so firm that this rule must prevail. Their Lordships further held that, although the English courts will not in wartime recognize laws passed in a foreign country purporting to alter the status of enemy aliens in this country, this principle ceases to operate at the end of the war.

The whole Court therefore held that the taxpayer did not have dual nationality during the relevant time, which was the period 1953-68. Buckley and Orr L.JJ. held that from the end of the war (9 July 1951) the Court was bound to recognize the efficacy of the German decree, and that from that date onwards the taxpayer had only British nationality. Lord Denning M.R. held that the taxpayer had no nationality other than British with effect from the date of his naturalization in 1948.

The proper law of a contract

Case No. 3. The continuing flow of cases concerned with the determination of the proper law of a contract suggests that the problem remains an intractable one. In *Coast Lines Ltd. v. Hudig & Veder Chartering N.V.*¹ the facts were as follows. English shipowners let a ship on a voyage charter to Dutch charterers. Under the charter the vessel was to proceed to Rotterdam, a Dutch port, and there load a cargo and carry it to Drogheda, an Irish port. The cargo was damaged on the voyage. The cargo owners claimed damages from the shipowners, who admitted liability to the cargo owners but now claimed to be indemnified by the charterers. In the circumstances of the case the charterparty, which had been drawn up and signed in Rotterdam, exempted the owners from liability so far as the charterers were concerned for loss or damage to the cargo. The bill of lading issued in Rotterdam made the shipowners liable to the cargo owners. Since the charterers were responsible for the presentation of the bill of lading, which imposed a greater liability upon the owners than that provided by the charterparty, the charterers were by English law liable to indemnify the owners in respect of that greater liability. In the Netherlands, however, the courts would be bound to apply the Netherlands Commercial Code under which, as it existed at the relevant time, the owners were unable to claim indemnity from the charterers.

The plaintiff owners obtained leave to serve notice of the writ upon the defendant charterers out of the jurisdiction. The defendants appealed against this to the Court of Appeal. In the circumstances of the case it was necessary to show that the proper law of the contract was English in order for the Court to have power to grant leave.

It seems clear that, had the parties' intention as to what law should govern been expressed or otherwise made clear, the Court would have given effect to it.² The intention of the parties was, however, unclear: recourse was therefore had to an objective test in order to determine the governing law. The proper formulation of that test is not free from doubt. Lord Denning M.R. said, 'Now we have to ask ourselves: what is the system of law with which the transaction has the closest and most real connection?'³ Megaw L.J. emphasized the significance of the use of the word 'transaction' rather than 'contract': attention is to be focused upon factual activity rather than upon the terms of the contract.⁴ Stephenson L.J. spoke of the country and system of law with which the contact and the transaction have the closest and most real connection,⁵ but agreed with Megaw L.J. upon the significance to be attached to the word 'transaction'.

¹ [1972] 2 Q.B. 34.

² *Ibid.*, Lord Denning M.R. at p. 44; Megaw L.J. at p. 46 and Stephenson L.J. at p. 50. Perhaps, however, these dicta are to be regarded as applicable only to a choice of English or Netherlands law and not to a choice of the law of a third country unconnected with the contract.

³ *Ibid.*, 44.

⁴ *Ibid.*, 46.

⁵ *Ibid.*, 50.

It is submitted that there is great force in Megaw L.J.'s contention. His Lordship said: 'I think it is not without significance to note that the connection which has to be sought is expressed to be connection between the *transaction*—that is, the transaction contemplated by the contract—and the system of law. That, I believe, indicates that, where the actual intention of the parties as to the proper law is not expressed in, and cannot be inferred from, the terms of the contract (so that it is impossible to apply the earlier part of the *Bonython* formula: "the system of law by reference to which the *contract* was made") more importance is to be attached to what is to be done under the contract—its substance—than to considerations of the form and formalities of the contract or considerations of what may, without disrespect, be described as lawyers' points as to inferences to be drawn from the terms of the contract.'¹ The language, terminology, form and terms of the contract may constitute a very useful guide in the search for the intention of the parties, bearing in mind that the search is for the *system of law* which they intended or assumed would govern their contract. However, once that search has been abandoned, the determination of the parties' intention with any degree of realism being impossible (as in the instant case), resort must perforce be had to a purely objective test as distinct from a test based upon an objectively determined presumed intention. Application of this purely objective test involves a geographical location of the transaction. It is actual or contemplated factual activity, rather than inference from the form, etc., of the contract, that is most relevant here.

It is suggested that by the same token, although connection with a *system of law* is important when seeking the intention of the parties, connection with a factual entity, a *country*, is more apt once resort has been had to purely objective localization. It is respectfully submitted therefore that Megaw L.J. could with greater felicity have referred to 'country' rather than 'system of law' in the opening sentence of the passage quoted from his judgment. Connection between a legal form (such as a contract) and a legal system can indicate the parties' intention as to the governing law. Connection between factual activity (such as a transaction) and a country signifies physical location.

In *Coast Lines Ltd. v. Hudig & Veder Chartering N.V.*² their Lordships held that, the scales being evenly balanced between English law and Netherlands law, English law, as the law of the flag, was the proper law of the contract. Megaw L.J. said, 'But to my mind the fact that the subject-matter of the charterparty was an English ship and that the whole of the transaction contemplated by the contract concerned the activities of that English ship, in loading, carrying and discharging the cargo, produces the result that the transaction, viewed as a whole and weighing all the relevant factors, has a closer and more real connection with English law than with the law of the Netherlands.'³ What is important is that the case was in a sense typical: it would seem that an objective determination of the proper law of any contract involving carriage by sea will frequently lead to the application of the law of the flag, at least if there is only one flag involved.

Having determined that the proper law was English, the Court had to decide whether the discretion, which it accordingly possessed,⁴ ought to be exercised so as to found jurisdiction in England against the charterers. They were a Netherlands company, owing no allegiance to the United Kingdom, and having neither a place of business nor assets within the jurisdiction. Lord Denning M.R. conceded that, 'it is a strong thing to force them to come to England to contest a case against them. So we must be exceedingly careful before doing so.'⁵ The Court had power to grant leave by virtue of

¹ *Ibid.*, 46.

⁴ R.S.C. Ord. 11 r. 1.

² [1972] 2 Q.B. 34.

³ *Ibid.*, 47.

⁵ [1972] 2 Q.B. 45.

its determination that the proper law of the contract was English, but the exercise of this power is purely discretionary. One fact alone seems to have persuaded their Lordships to exercise this discretion in the shipowner's favour and to grant leave. This was the circumstance that, if he sought relief in the Netherlands, he would fail because the Netherlands courts would not be free to apply the proper law of the contract (English law), under which he would seemingly succeed, but would be forced to apply a special law of the Netherlands regardless of the proper law of the contract. The Court does not seem to have been swayed by the fact that the plaintiff would fail in the Netherlands *simpliciter*, but by the fact that he would be the victim of an objectionable rule of Netherlands law. That rule, applying as it did to any charterparty involving the carriage of goods from any Dutch port whether or not it was the first port of loading and whether or not it had any other connection with Holland, was described by the Master of the Rolls as 'contrary to the general understanding of commercial men'.¹ Megaw L.J. said, 'If English law is the proper law of the contract, and the contract does not offend against the public policy of this country or what may be called the general public policy of maritime nations, to be implied from the terms of the international convention, comity, in my view, does not demand that a party who desires to have his dispute decided in accordance with the proper law of the contract should be precluded from having it so decided. That, on the evidence, would be the consequence of a refusal of leave to serve notice of the writ out of the jurisdiction of this case.'²

Polygamous marriages and divorces

Cases Nos. 4 and 5. The two *Radwan* cases³ arose out of the same facts but are concerned with different problems in private international law: the first case deals with the recognition of a foreign divorce, and the second with the validity of a polygamous marriage.

The facts were these. In 1951 a man domiciled in Egypt and a woman domiciled in England entered into a polygamous marriage according to Muslim law at the Egyptian Consulate in Paris. Their matrimonial home was established in Egypt. In 1956 the parties came to England, and three years later the man acquired an English domicile of choice. In 1970 he obtained a talaq divorce at the Consulate General of the United Arab Republic in London. The wife then filed a petition for divorce in the High Court on the ground of cruelty, and the husband by his answer denied cruelty and cross prayed for a decree of divorce on the ground that the marriage had irretrievably broken down.

A question arose as to whether the English courts would recognize the talaq divorce: in the first *Radwan* case, the issue for determination was as to whether the premises of the Consulate General in London, where the talaq had been obtained, were within or outside the British Isles for the purposes of recognition under the Recognition of Divorces and Legal Separations Act, 1971. In *Radwan v. Radwan (No. 2)* the issue was as to the original validity of the marriage.

In order to establish the efficacy of the talaq divorce it was necessary to show that it 'had been obtained by means of judicial or other proceedings in any country outside the British Isles'.⁴ In the first *Radwan* case Cumming-Bruce J. held that the premises of an

¹ [1972] 2 Q.B. 45. The rule has now been changed.

² *Ibid.*, 49.

³ *Radwan v. Radwan* [1973] Fam. 24; *Radwan v. Radwan (No. 2)* [1973] Fam. 35.

⁴ Recognition of Divorces and Legal Separations Act, 1971 S. 2. Reliance could not be placed upon the validity of the divorce according to the law of the domicile, because before it was obtained the man had acquired a domicile in England. The earlier decision of *Qureshi v. Qureshi* [1972] Fam. 173, was distinguished on this ground. The *Qureshi* decision has subsequently itself been affected by the Domicil and Matrimonial Proceedings Act, 1973 S. 16.

embassy or consulate are part of the territory of a receiving and not of a sending State. The talaq divorce had thus not been obtained outside the British Isles, and it was accordingly not entitled to recognition. The learned judge was unable to rest his determination upon any earlier English authority which was exactly in point, but relied upon considerations of principle, the views of authors and the approach taken by courts in some other jurisdictions. Few, if any, will question the correctness of Cumming-Bruce J.'s conclusion. One might, however, have some reservations about the generality with which the learned judge viewed the problem before him. It could be contended that the question for determination was essentially one of the interpretation of the words of a particular statute. It would no doubt be right to hold that as a matter of Common Law the premises of a foreign embassy or consulate in the British Isles are British territory. Whether a British court would as a matter of Common Law regard, e.g., a British embassy or consulate abroad as part of the territory of the receiving State in the (perhaps unlikely) event of its being regarded as British territory by the receiving State, is less clear. Moreover, although there would seem to be no good reason for departure from Common Law principle in construing section 2 of the Recognition of Divorces and Legal Separations Act, 1971, it does not inexorably follow that all statutes will merit construction in this way. It is to be hoped that at the general level *Radwan v. Radwan* will be regarded as doing no more than propounding a rule of thumb, although in practice it may well require very strong countervailing considerations to justify deviation from it.

Of additional and incidental interest is Cumming-Bruce J.'s apparent admission to some qualms over his earlier decision in *Ali v. Ali*.¹ There he had held a husband was able to convert his potentially polygamous marriage into a monogamous marriage by acquiring a domicile of choice in England. This decision has been heavily criticized,² but is meretriciously defended in *Dicey and Morris*.³ In *Radwan v. Radwan* the learned judge observed *obiter* that a question might arise as to whether, by his acquisition of an English domicile in 1959, the husband had converted his marriage into a monogamous union. Noting that in *Ali v. Ali* he had not had 'the advantage of hearing argument against the extension of the doctrine of conversion', he stated that if the question did arise he would seek the assistance of the Queen's Proctor in this regard adding that 'no little research may be necessary'.⁴

In *Radwan v. Radwan* (No. 2)⁵ Cumming-Bruce J. considered the validity of the original marriage between the parties. Two questions arose.

The first was as to formalities. The ceremony had taken place at the Egyptian Consulate in Paris. Consistently with his general approach in the first *Radwan* case, the learned judge regarded the *locus celebrationis* as being France. French law, therefore, fell to be applied to the question of the marriage's formal validity, French law meaning in this context French private international law.⁶ However, the evidence of the relevant French rules as applicable to the facts of the instant case was inconclusive. In these circumstances Cumming-Bruce J. expressly declined to find as a fact the state of French law and fell back upon the presumption of the validity of the ceremony. He accepted the position as stated by Barnard J. in *Russell v. Attorney General*:⁷ 'It is clear from the

¹ [1968] P. 564.

² Tolstoy (1968), 17 I.C.L.Q. 721. See too, this *Year Book*, 41 (1965-6), pp. 442-4.

³ Dicey and Morris, *The Conflict of Laws* (9th ed., 1973), p. 283.

⁴ [1973] Fam. 24, 27.

⁵ [1973] Fam. 35.

⁶ The rule that the formal validity of a marriage is governed by the law of the place of celebration embraces the doctrine of *renvoi*. See *Hooper v. Hooper* [1959] W.L.R. 1021, and dicta in the Court of Appeal in *Taczanowski v. Taczanowska* [1957] P. 301.

⁷ [1949] P. 391, 394.

authorities which have been cited to me that where there is evidence of a ceremony of marriage having been performed, followed by cohabitation of the parties, the validity of the marriage will be presumed, in the absence of decisive evidence to the contrary.'

The second aspect of validity to be determined was as to the wife's capacity to enter into a polygamous marriage. Immediately prior to the ceremony she had been domiciled in England, but the intended and actual matrimonial home was in Egypt. The learned judge held that whether a person lacks capacity to enter into a marriage on the ground that it is polygamous is to be determined by the law of the intended matrimonial home. He concluded that the wife 'had the capacity to enter into a polygamous union by virtue of her prenuptial decision to separate herself from the land of her domicile and to make her life with her husband in his country, where the Mohammedan law of polygamous marriage was the normal institution of marriage'.¹

Capacity to marry in the conflict of laws is a field in which the two leading living English academic writers on private international law, Dr. Cheshire and Dr. Morris, have enjoyed target practice at aunt sallies for some considerable time. The almost total lack of genuinely decisive authority on the subject is perhaps more significant. Cumming-Bruce J. in *Radwan v. Radwan* (No. 2) had to choose between resort to the dual domicile test, which on the facts would have involved reference to English law as it was the wife's capacity that was in question, and reference to Egyptian law as the law of the intended matrimonial home. The learned judge does not seem to have underdramatized his role: he saw it as involving 'grasping a nettle' and 'awarding an accolade'.² The actual ratio of the case is, however, in a sense quite narrow: it appears to be that a woman's (and presumably a man's) incapacity or otherwise to enter into a marriage on the ground that it is polygamous is to be determined by the law of the intended matrimonial residence (at least if effect has been given to the intention). The correctness of this decision is scarcely open to rational contradiction on policy grounds.³ By the same token a person's incapacity or otherwise to enter into a monogamous marriage should be governed by the law of the intended matrimonial residence. If, for example, a man domiciled in Scotland goes through a monogamous marriage ceremony in England with a woman who lacks capacity by the law of her domicile to enter into such a union, the parties always intending and actually setting up their matrimonial home in England, can it plausibly be contended that the marriage ought to be regarded as a nullity?

Two comments may be offered: one specific and the other rather general.

The learned judge lucidly demonstrated the irrelevance of Section 1 of the Nullity of Marriage Act, 1971 (as amended by Section 4 of the Matrimonial Proceedings (Polygamous Marriages) Act, 1972) by drawing attention to the limitations imposed upon its scope by Section 4 of the 1971 Act itself. Section 4 of the 1972 Act provided, 'In Section 1 of the Nullity of Marriage Act, 1971 (which states as respects England and Wales the grounds on which a marriage taking place after the commencement of that Act is void), after paragraph (c) there shall be added—(d) in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales. For the purposes of paragraph (d) of this Section a marriage may be polygamous although at its inception neither party has any spouse additional to the other.' Section 4 of the 1971 Act, however, expressly excludes from the scope of Section 1 cases in which the *lex causae* is not English law.

¹ [1973] Fam. 35. 54.

² *Ibid.*, 45.

³ But cf. Dicey and Morris, *The Conflict of Laws* (9th ed., 1973), p. 289.

The *lex causae* in *Radwan v. Radwan* (No. 2) was found to be Egyptian law as the law of the intended matrimonial home.

Cumming-Bruce J. made the concession that 'it probably is the case that the draftsmen of Section 4 of the Act of 1972 took the view that the dual domicile test represented the common law upon the capacity of a domiciled Englishman or Englishwoman to enter into polygamous marriage', but robustly rejected its relevance: 'I am concerned with the common law rights of the lady who in 1951 was Miss Mary Magson. Those rights are not to be cut down by any misapprehension about the common law entertained by the Law Commission, by the Government, or by Parliament.'¹ The learned judge anticipated² that a further statutory enactment would be necessary if English domiciliaries are to be deprived of capacity to enter into polygamous marriages abroad even if their intended and actual matrimonial home is in a polygamous country. To date, however, legislative activity has taken the form of re-enactment of the statutory provisions which Cumming-Bruce J. had to consider. The substance of Section 1 of the 1971 Act, as amended by Section 4 of the 1972 Act, and the substance of Section 4 of the 1971 Act, are now contained in Sections 11 and 14 (1) respectively of the Matrimonial Causes Act, 1973. The validity of *Radwan v. Radwan* (No. 2) has been in no way impaired.

What is the significance of the decision as regards capacity to marry generally? The learned judge reviewed the authorities broadly. He accepted the Court of Appeal decision in *De Reneville v. De Reneville*³ as holding that the law of the matrimonial domicile governs essential validity in relation to nullity on the ground of incapacity or wilful refusal to consummate. On the other hand he does not hold that all questions of capacity or essential validity are to be governed in this way, emphasizing that nothing in his judgment in the instant case 'bears upon the capacity of minors, the law of affinity, or the effect of bigamy upon capacity to enter into a monogamous union'.⁴

The wide importance of the *Radwan* (No. 2) case is not that it lends support to one side or another in historic 'doctrinal' controversy, but that it highlights the sterile rigidity of the traditional terms of that controversy. There is no reason in logic or in policy to assume that all questions (other than those pertaining to form) of validity of marriage should be governed by the same law. As Cumming-Bruce J. said, 'It is arguable that it is an over-simplification of the common law to assume that the same test for purposes of choice of law applies to every kind of incapacity—non-age, affinity, prohibition of monogamous contract by virtue of an existing spouse, and capacity for polygamy. Different public and social factors are relevant to each of these types of incapacity. . . .'⁵ In a developed conflict of laws jurisprudence, each type of alleged incapacity or defect might have its own choice of law rule, formulated in the light of the particularly relevant factors. The value of earlier authority will thus become relative to the specific capacity issue involved.

A final point. If, as is to be hoped, *Radwan v. Radwan* (No. 2) is a signal for the abandonment of the over-generalized attitudes of the past and a fresh appraisal of choice of law rules relating to capacity to marry, it ought not to be assumed that, in the case of every incapacity, a rule of single reference will necessarily be the most appropriate. It could be that a rule of alternative reference for the purpose of validating the marriage will sometimes be preferable.⁶

P. B. CARTER

¹ Ibid., 52.

² Ibid., 54.

³ [1948] P. 100.

⁴ [1973] Fam. D. 35, 54.

⁵ Ibid., 51.

⁶ A similar idea was implicit in a recommendation of the Royal Commission on Marriage and Divorce (Report published 1956, Cmd. 9678) App. IV, Part I, 4 (3), p. 395.

DECISIONS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES DURING 1971-1972*

Treaty-making power of the E.E.C.—transfer of treaty-making power from member States to the Community—implied powers—type of acts open to review by the Court

Case No. 1. *Commission of the European Communities v. Council of the European Communities*.¹ This is the first dispute between the Commission and the Council which has come before the Court, and the Court's judgment lays down rules of the greatest importance concerning the constitutional structure of the E.E.C.

In 1962 five of the six member States of the E.E.C. and a number of other European States signed a European Agreement on Road Transport, dealing with the hours of work of the crews of lorries providing international road transport. The agreement did not receive enough ratifications to enter into force; in 1967 negotiations for its revision began, and continued for some years. Meanwhile in 1969 the E.E.C. adopted Regulation 543/69 on the same subject-matter. On 20 March 1970 the Council of the European Communities passed a resolution laying down the negotiating position of the member States of the E.E.C. in the negotiations for the revision of the 1962 Agreement. The member States conducted the negotiations with non-member States in accordance with this resolution, and a revised agreement was opened for signature on 1 July 1970.

The Commission of the European Communities asked the Court to annul the Council's resolution of 20 March 1970.

The Council challenged the admissibility of the Commission's action on the grounds that the resolution was not an act open to review within the meaning of Article 173 of the E.E.C. Treaty.² The Court held that the admissibility of the action depended on the answer to a preliminary question concerning the location of the power to conclude the European Agreement on Road Transport; if the treaty-making power belonged to the Community, then the Council's resolution constituted an exercise of power by a Community organ, which was open to review by the Court; but if the treaty-making power belonged to member States, then the Council's resolution was simply an attempt by member States to co-ordinate their policy on matters within their domestic jurisdiction, and was not open to review by the Court.³

The provisions of the E.E.C. Treaty on transport did not expressly give the Community the power to make treaties on transport questions, but the Court inferred the existence of such a power from other provisions of the Treaty. Article 210 provides that the Community has legal personality, and the Court inferred from this that the Community had the power to make treaties with non-member States covering the whole range of the purposes for which the E.E.C. had been created. Such power might

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¹ *Recueil de la jurisprudence*, 17 (1971), p. 263; [1971] *Common Market Law Reports* 335.

² Article 173 provides:

The Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions. . . .

³ Over the years, the Council, which is composed of representatives of member States, has acquired a double role—it acts as a Community organ when implementing the Treaty, and it also acts as a standing conference of member States on matters which are not directly regulated by the Treaty. The legal problems caused by the co-existence of these two different functions are discussed by the Advocate-General Dutheillet de Lamothe (*Recueil de la jurisprudence*, 17 (1971), pp. 288-9; [1971] *Common Market Law Reports* 342-3).

be conferred by express provisions (e.g. Article 238 on association agreements, and Articles 113-16 on tariffs and trade) or it might be inferred from other provisions of the Treaty or from instruments enacted to implement the Treaty; in particular, whenever the Community enacted rules to give effect to a common policy prescribed by the Treaty, the power to make treaties with non-member States affecting those rules passed automatically from member States to the Community. In support of this ruling, the Court cited Article 5 of the Treaty, which provides as follows:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.

The Court held that the enactment of Regulation 543/69 had had the effect of transferring from member States to the Community the power to make treaties with non-member States on the same subject-matter; this transfer was recognized by Article 3 of the Regulation, which provided that 'the Community shall undertake with non-member countries any negotiations necessary to give effect to the present regulation'.

One cannot help feeling that the Court's reasoning is singularly fragile. Article 210 is probably concerned with personality in municipal law, not international law. Article 5 appears to deal with the obligations of member States *inter se*, not with their capacity to enter into treaties with non-member States. Article 3 of Regulation 543/69 can equally well be regarded as a delegation of power by member States to the Community, i.e. as an exception to (and confirmation of) the general principle that treaty-making power normally belongs only to the member States. Similarly, the fact that the E.E.C. Treaty expressly transfers treaty-making power from member States to the Community in some fields surely suggests that a similar transfer cannot be inferred in other fields—*inclusio unius, exclusio alterius*. It is also worth pointing out that Article 101 of the Euratom Treaty gives Euratom the power to conclude treaties on all questions governed by the Euratom Treaty; the omission of a similar provision from the E.E.C. Treaty was surely deliberate.

Having decided the preliminary question in the Commission's favour, the Court turned to the question of admissibility. Article 189 of the E.E.C. Treaty lists five types of act which the Council and Commission may issue—regulations, directives, decisions, recommendations and opinions. Article 173 provides that acts other than recommendations and opinions may be reviewed by the Court. The Council argued that its resolution of 20 March 1970 was not open to review, because it was neither a regulation nor a directive nor a decision. But the Court held that Article 173 is not limited to the categories listed in Article 189; any act which seeks to produce a legal effect can be challenged under Article 173, even if it is not a regulation, directive or decision.¹

Since the only matters excluded from the ambit of the application for annulment open to the member States and the institutions are 'recommendations or opinions'—which by the final paragraph of Article 189 are declared to have no binding force—Article 173 treats as acts open to judicial review all measures taken by the institutions designed to have legal effect.

¹ However, if it is not a regulation, directive or decision, it cannot, according to the Court, be attacked on the grounds that it does not contain a statement of reasons; for the requirement of a statement of reasons, imposed by Article 190, applies only to regulations, directives and decisions.

A restrictive interpretation to the contrary would be incompatible with the purpose of Article 164, which provides that the Court shall ensure respect for law in the application of the Treaty. The proceedings against the resolution of 20 March 1970 were admissible, because the resolution did seek to create legal effects; the resolution rejected the Commission's claim that the Treaty required the Commission to take a bigger part in conducting the negotiations, and it imposed legal obligations by laying down the aims which the member States were to pursue during the negotiations on the European Agreement on Road Transport, and by calling on the Commission to propose such amendments to Regulation 543/69 as might be necessary to adapt it to the terms of the European Agreement. If the Court annulled the resolution, the Council and the Commission would have to re-examine *ab initio* the whole question of the negotiation of the European Agreement on Road Transport; the fact that annulment of the resolution would thus have definite legal effects confirmed the view that the resolution itself had definite legal effects.

The Court also rejected a plea by the Council that the Commission's own conduct deprived it of *locus standi*:

Next, the Council considers that the Commission is disqualified from pursuing such an action because the Commission itself is responsible for the situation in question through having failed to take, at the proper time, the steps necessary to allow Community authority to be exercised, by submitting suitable proposals to the Council.

However, since the questions put before the Court by the Commission are concerned with the institutional structure of the Community, the admissibility of the application cannot depend on prior omissions or errors on the part of the applicant.¹

On the merits of the case, the Commission argued that the resolution of 20 March 1970 was illegal because it provided for the European Agreement on Road Transport to be negotiated by the member States, and not by the Commission, as required by Article 228 (1) of the E.E.C. Treaty.² The Court agreed that treaties should normally be negotiated by the Commission,³ but held that this only applied if the negotiations had begun after the transfer of treaty-making power over the field in question to the

¹ Would the importance of safeguarding the institutional structure of the Community lead to a relaxation of the normal time limits for bringing proceedings? Cf. this *Year Book*, 44 (1970), pp. 250-1. But the Court found that the Commission's action had been brought within the normal time limit, without suggesting that it was unnecessary to observe the time limit; and it would lead to intolerable uncertainties if no time limit were imposed on claims that a treaty concluded with non-member States had been negotiated in an illegal manner.

² Article 228 (1) provides:

Where this Treaty provides for the conclusion of agreements between the Community and one or more States or an international organization, such agreements shall be negotiated by the Commission. Subject to the powers vested in the Commission in this field, such agreements shall be concluded by the Council, after consulting the Assembly where required by this Treaty.

³ Since the European Agreement on Road Transport was negotiated under the auspices of the United Nations Economic Commission for Europe, the Court also thought that Article 116 was applicable. Article 116 provides:

From the end of the transitional period onwards, member States shall, in respect of all matters of particular interest to the common market, proceed within the framework of international organizations of an economic character only by common action. . . .

Quite apart from the fact that Article 116 appears in the part of the Treaty dealing with commercial policy, and not in the part dealing with transport, Article 116 cannot be applied to the conclusion of treaties, or at least cannot be applied simultaneously with Article 228; Article 116 would require negotiation by member States, whereas Article 228 requires negotiation by the Commission.

Community. In the present case, negotiations with non-member States had begun long before the enactment of Regulation 543/69 had transferred treaty-making power over the relevant topics to the Community, had the negotiations could easily have broken down if the member States had withdrawn from the negotiations and had been replaced by the Commission. The procedure adopted for negotiating the Agreement was not therefore contrary to Article 228.

The Commission also argued in the alternative that the Council should have vested treaty-making power in the Community by making use of Article 235, which provides:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures.

The Court held that Article 235, although applicable to the external relations of the Community, did not create any obligation, but merely gave the Council a power and that non-exercise of that power could not affect the validity of a resolution.

Although the Commission lost its case, the Court's rulings on the major issues accepted the Commission's arguments; the Commission lost only because the Court held that the particular treaty in question must, for practical reasons, be treated as an exception to the general principles which the Court laid down. Those principles represent an extremely bold interpretation of the E.E.C. Treaty, and it is uncertain whether member States will accept them in practice. It is true that the Commission will be able to sue member States under Article 169 if they continue to conclude treaties with non-member States in defiance of the Court's views about treaty-making power, but there is no way in which the Court's judgment can be enforced.

It is one thing to say that a member State which concludes a treaty containing provisions which conflict with an E.E.C. regulation is in breach of its obligations under the E.E.C. Treaty. It is quite another thing to say that member States have no capacity to conclude treaties on topics which are governed by E.E.C. regulations. The Court's judgment goes much further than is necessary. It could also lead to undesirable results. Community law is growing all the time, and it may often be difficult to tell whether Community law on a particular topic has reached the requisite degree of development for treaty-making power on that topic to pass from the member States to the Community. Conversely, since the development of Community law will be accompanied by a transfer of treaty-making power from the member States to the Community, there is a danger that the member States represented on the Council will deliberately retard the development of Community law in order to minimize their own loss of treaty-making power.

Since the Court spoke in terms of a transfer of treaty-making power from member States to the Community, it would seem that a treaty concluded by member States in violation of the rules deduced by the Court from the E.E.C. Treaty would be void on the international plane. The International Law Commission, however, has expressed the view elsewhere that the fact that a State concludes a treaty in violation of its duties under a pre-existing treaty can never (apart from cases involving *jus cogens*) render the later treaty void.¹ The only way of reconciling the views of the Court and of the International Law Commission is to regard the E.E.C. Treaty as resembling a federal constitution rather than a traditional treaty. In these circumstances the matter

¹ See the Commission's commentary on what subsequently became Article 30 of the Vienna Convention on the Law of Treaties: *American Journal of International Law*, 61 (1967), pp. 345-8.

would be governed by Article 46 of the Vienna Convention on the Law of Treaties, which provides:

1. A State may not invoke the fact that its consent to be bound has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent to be bound unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

Even so, one may doubt whether a breach of the rules laid down by the Court would be 'manifest' to non-member States within the meaning of Article 46.

Distinction between regulations and decisions—scope of judicial review

*Case No. 2. N.V. International Fruit Company and others v. Commission of the European Communities.*¹ In 1970 the Commission, acting under powers delegated to it by the Council, took steps to prevent a threatened glut of apples in the Common Market. It required would-be importers of apples to apply to national authorities for import licences; the national authorities would then forward the applications to the Commission, which would decide whether or not to grant them. On 19 May 1970 the plaintiffs applied for import licences to the Produktschap voor Groenten en Fruit (P.G.F.), the appropriate authority in the Netherlands. On 28 May the Commission issued Regulation 983/70, granting import licences if certain conditions were fulfilled. Since these conditions were not fulfilled in the plaintiff's case, the P.G.F. informed them that their applications had been rejected.

The plaintiffs asked the Court to annul Regulation 983/70. The Commission pleaded that the proceedings brought by the plaintiffs were inadmissible. Article 173 of the E.E.C. Treaty gives member States, the Council and the Commission a right to bring proceedings for the annulment of regulations, directives and decisions; an individual or a corporation, however, may bring proceedings for annulment only 'against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'.² The plaintiffs argued that Regulation 983/70 was in reality a decision which concerned each of them directly and individually.

The Court held for the plaintiffs on this point.

attendu qu'il est constant que le règlement no. 983/70 a été arrêté au vu, d'une part, de la situation du marché et, d'autre part, des quantités de pommes de table pour lesquelles des demandes individuelles de titres d'importation avaient été déposées au cours de la semaine expirant le 22 mai 1970;

que, lors de l'adoption dudit règlement, le nombre des demandes susceptibles d'en être affectées était donc déterminé;

qu'aucune nouvelle demande ne pouvait s'y ajouter;

que c'est en considération de la quantité totale pour laquelle des demandes avaient été introduites qu'a été déterminé le pourcentage dans les limites duquel il pouvait y être satisfait;

que, de ce fait . . . , la Commission, même si elle a pris connaissance uniquement des quantités demandées, a décidé de la suite à donner à chaque demande déposée;

¹ *Recueil de la jurisprudence*, 17 (1971), p. 411.

² Although an individual (or corporation) cannot ask the Court to annul a regulation, he can ask the Court to grant him compensation under Articles 178 and 215 (2) for the loss which he has suffered as a result of an illegal regulation: *Aktien-Zuckerfabrik Schöppenstedt v. Council of the European Communities* (ibid., p. 975).

qu'il s'ensuit que l'article 1 du règlement no. 983/70 ne constitue pas une disposition de portée générale . . . , mais doit s'analyser en un faisceau de décisions individuelles prises par la Commission . . . sous l'apparence d'un règlement, chacune affectant la situation juridique de chacun des auteurs de demandes;

qu'elles concernent donc individuellement les requérantes.¹

The Commission also argued that the plaintiffs' applications had been rejected by the P.G.F., and that the proceedings should have been brought against the P.G.F., not against the Commission. The Court rejected this argument, holding that the P.G.F. was merely a channel for implementing the Commission's wishes; the real decision had been taken by the Commission.

After declaring the proceedings admissible, the Court rejected the claim on the merits.

Council Regulation 2513, on which the Commission's measures were based, authorized the Commission to suspend imports or exports of fruit if the Community market were threatened with serious disturbances as a result of imports or exports. The plaintiffs argued that the market was not threatened by serious disturbances. The Court held that it was so threatened. What is remarkable, though, is that the Court made its own assessment of the economic situation, without suggesting that it was bound in any way by the Commission's reading of the economic situation.²

The plaintiffs also argued that Regulation 2513 only authorized the Commission to suspend imports totally; it did not authorize the Commission to place quantitative restrictions on imports. The Court rejected this argument by invoking the principle *qui peut le plus, peut le moins*:

. . . conformément aux objectifs généraux du traité, les mesures de sauvegarde admises par les règlements nos. 2513/69 et 2514/69 ne peuvent être arrêtées que pour autant qu'elles sont strictement nécessaires au maintien des objectifs de l'article 39 du traité et qu'elles portent le moins possible atteinte au fonctionnement du marché commun;

qu'il s'ensuit que, si la Commission pouvait arrêter des mesures de sauvegarde ayant pour effet la cessation totale des importations en provenance des pays tiers, elle pouvait, à plus forte raison, appliquer des mesures moins restrictives.

Finally, the plaintiffs contended that the whole system of restrictions on imports was illegal because it was contrary to G.A.T.T. The Court rejected this contention without giving any reason. The Advocate-General Roemer was more explicit. He said that the plaintiffs' contention was unsupported by argument, and that the Court could be asked to annul a decision only on one or more of the four grounds listed in Article 173 of the E.E.C. Treaty—incompetence, violation of mandatory procedural require-

¹ The Court gave a similar judgment in *Werner A. Bock v. Commission of the European Communities*, *ibid.*, p. 897, where the Commission took a decision authorizing the Federal Republic of Germany to reject applications for licences to import mushrooms; the Commission, when taking this decision, knew that the German Government had requested the decision in order to be able to reject applications which had been made *already*. The Court held that the number and identity of the importers affected were therefore 'déterminés et vérifiables' before the decision was taken, and that the decision, although addressed to the German Government, concerned the importers directly and individually, so that each of them had *locus standi* to challenge it under the second paragraph of Article 173.

² The Court's approach would have been different if proceedings had been brought under the E.C.S.C. Treaty, Article 33 of which provides: 'The Court may not . . . examine the evaluation of the situation, resulting from economic facts or circumstances, in the light of which the High Authority took its decisions or made its recommendations, save where the High Authority is alleged to have misused its powers or to have manifestly failed to observe the provisions of this Treaty or any rule of law relating to its application.'

ments, violation of the Treaty or of rules of law concerning its application, and misuse of power—and not on the ground of breach of international law.¹

Invalidity of regulations which conflict with international law—G.A.T.T.—whether G.A.T.T. binding on the E.E.C.—whether G.A.T.T. confers rights on individuals

*Case No. 3. International Fruit Company N.V. and others v. Produktschap voor Groenten en Fruit.*² A series of E.E.C. regulations imposed quotas on the import of fruit from non-member States. In proceedings before a Dutch tribunal, the plaintiffs challenged the validity of these regulations on the grounds that they were contrary to Article XI of the General Agreement on Tariffs and Trade which, subject to various exceptions, prohibits quantitative restrictions on trade between contracting parties. The Dutch tribunal referred the case to the Court of Justice of the European Communities under Article 177 of the E.E.C. Treaty and asked it to decide whether the validity of Community acts could be challenged on the grounds that they were contrary to international law, and, if so, whether the regulations in question were contrary to Article XI of G.A.T.T.

The Court recalled that Article 177 empowered it to give rulings on the validity of Community acts. Article 177 did not limit the grounds on which the validity of Community acts could be challenged, and the Court must therefore examine whether an act conflicted with international law. However, the validity of an act could be affected by its being contrary to a rule of international law only if that rule were binding on the Community; in addition, when the invalidity of the act arose as an issue before a national tribunal, it was necessary to prove that the rule of international law in question conferred rights on individuals.

The Court then examined whether these conditions were met in the case of G.A.T.T.

All the member States of the E.E.C. have been parties to G.A.T.T. since at least 1951. But the Court did not regard that fact as sufficient to make G.A.T.T. binding on the E.E.C. This may seem rather surprising, but it should be remembered that the E.E.C. has an international personality and a treaty-making power separate from those of its members. In the case of treaties concluded at the present day, one merely has to see whether the E.E.C. is a party to the treaty to determine whether the E.E.C. is bound by it. The difficulty lies in deciding whether the E.E.C. has succeeded, so to speak, to treaties made by its member States before the creation of the E.E.C.

The Court pointed out that the member States, by setting up the E.E.C., could not release themselves from their obligations to the other contracting parties to G.A.T.T.; on the contrary, the member States had pledged themselves, both by the terms of the E.E.C. Treaty and by declarations made to the other contracting parties to G.A.T.T., to continue to perform their obligations under G.A.T.T. The member States had gradually transferred to the Community the power to levy tariffs and the power to make treaties concerned with tariffs and trade; when transferring these powers to the Community, the member States had made it clear that they intended the Community to be bound by G.A.T.T. The transfer of powers to the Community had been recognized by the other contracting parties to G.A.T.T. The member States continued to be parties to G.A.T.T. and the Community was not technically a party to G.A.T.T., but the Council and the Commission had acted on behalf of the Community by taking

¹ *Recueil de la jurisprudence*, 17 (1971), pp. 436-7. But see below, p. 446.

² *Recueil de la jurisprudence*, 18 (1972), p. 1219; *American Journal of International Law*, 67 (1973), p. 559.

part in tariff negotiations and by concluding treaties within the framework of G.A.T.T. The Court therefore held that G.A.T.T. was binding on the Community.

On the other hand, the Court held that G.A.T.T. did not confer rights on individuals. The provisions of G.A.T.T. were extremely flexible, being full of exceptions and escape clauses. The machinery for the settlement of disputes under G.A.T.T. was very informal. Since it was clear that Article XI of G.A.T.T. did not confer rights on individuals, the question whether the E.E.C. regulations conflicted with G.A.T.T. did not arise.

There are several comments worth making about the Court's judgment.

In the first place, it is rather unfortunate that the Court approached the question of a conflict between Community acts and international law solely as if it were a question of interpreting Article 177. The question is one of substance and not only of procedure. Even from a purely procedural point of view, the question can arise in other contexts; for instance, could the Court annul a regulation under Article 173 on the grounds that it conflicted with international law? One of the grounds for annulment under Article 173 is 'infringement of this Treaty *or of any rule of law relating to its application*' (italics added), and it would seem that these latter words are wide enough to include rules of international law.¹ After all, it is hard to imagine that the Court would treat a regulation as invalid for the purposes of Article 177 and valid for the purposes of Article 173. Indeed, when the Court said that the invalidity of a Community act on the grounds that it conflicted with international law was dependent on proof that the rule of international law in question conferred rights on individuals, it specified that this requirement applied only if the invalidity of the act arose as an issue before a national tribunal. The wording used by the Court implies not only that the issue of invalidity could be pleaded in another procedural context (e.g. Article 173), but also that the requirement that the rule of international law must confer rights on individuals would not apply in other procedural contexts. It is understandable that this requirement should not apply to proceedings for annulment brought under Article 173 by member States or by Community institutions; it is more surprising that it should not apply to proceedings for annulment brought under Article 173 by individuals, but that is what the Court apparently implied.

On the other hand, it is unlikely that the Court would refuse to apply a provision of the E.E.C. Treaty on the grounds that it conflicted with international law, although it is to be hoped that the Court would try to interpret the Treaty so that it did not conflict with international law—just as English courts are bound to apply Acts of Parliament but try to interpret them so as not to conflict with international law. But this is not a problem of great practical importance, because treaties are seldom invalid in international law.

If the E.E.C. Treaty conflicted with G.A.T.T., the international responsibility of the member States of the E.E.C. would be engaged towards the other contracting parties to G.A.T.T., but, according to the Vienna Convention on the Law of Treaties, the E.E.C. Treaty would not be invalid in international law. Why, then, should an E.E.C. regulation be treated as invalid if it conflicts with G.A.T.T.? The answer would appear to be that international law does not require the Court of Justice of the European Communities to treat the regulation as invalid; invalidity is a matter of Community law, not of international law. But international law does require the E.E.C. to do something to undo the consequences of an E.E.C. regulation conflicting with

¹ Despite the dicta of the Advocate-General Roemer in *N.V. International Fruit Company and others v. Commission of the European Communities*; see above, pp. 445-6.

G.A.T.T., and treating the regulation as invalid is a less cumbersome way of undoing its consequences than going through the procedure of repealing it.

Illegal regulations—human rights—general principles of law—discrimination on grounds of sex—equal pay—Community officials

*Case No. 4. Sabbatini (née Bertoni) v. European Parliament.*¹ When the plaintiff went to work for the defendant at Luxembourg in 1960, she was paid an expatriation allowance. In 1970 she married and on 17 November 1970 the defendant informed her that she would no longer be paid the expatriation allowance. This decision was based on Article 4 (3) of Annex VII to the Staff Regulations, which provides:

An official who marries a person who at the date of marriage does not qualify for the allowance shall forfeit the right to expatriation allowance unless that official thereby becomes a head of household.

Article 1 (3) of Annex VII provides that 'head of household' normally means a male official; a female official is regarded as 'head of household' only in exceptional circumstances, e.g. if her husband is seriously ill.

The plaintiff asked the Court to annul the decision of 17 November 1970 on the grounds that Article 4 (3), on which it was based, was illegal because it was contrary to a general principle of law forbidding discrimination on grounds of sex and to Article 119 of the E.E.C. Treaty, which provides that 'each member State shall . . . ensure . . . the application of the principle that men and women should receive equal pay for equal work'.

The Court analysed the purpose of the expatriation allowance and pointed out that, in the case of married officials, the allowance was paid to take account, not only of the recipient's personal situation, but also of the family situation resulting from the marriage; withdrawal of the expatriation allowance could therefore be justified if the recipient's marriage caused him to become a member of the local community. However, the Staff Regulations ought not to treat officials differently according to their sex; the question whether an official had ceased to be 'expatriated' should be determined in accordance with uniform criteria, disregarding differences of sex. By making the continuation of the expatriation allowance depend on the acquisition of the status of 'head of household', as defined in Article 1 (3), the Staff Regulations established an arbitrary difference of treatment between officials. Consequently the decision of 17 November 1970 lacked legal basis and had to be annulled.

It is settled law that the E.E.C. Treaty must override a regulation in the event of conflict, and the Court had already declared *obiter*² that a regulation will be illegal if it conflicts with the general principles of law common to the constitutional laws of member States protecting fundamental human rights. But the Court's judgment does not make clear whether it is based on Article 119 of the E.E.C. Treaty or on general principles of law. As the Advocate-General Roemer pointed out,³ it is difficult to maintain that there is a general principle of law forbidding *all* discrimination on grounds of sex; the defendant cited many provisions from the laws of member States discriminating on grounds of sex in various fields, and the plaintiff made no real attempt to combat the defendant's arguments. However, although there is probably no general

¹ *Recueil de la jurisprudence*, 18 (1972), p. 345; [1972] *Common Market Law Reports*, 945.

² Notably in the *Internationale Handelsgesellschaft* case, *Recueil de la jurisprudence*, 16 (1970), p. 1125 at p. 1135; [1972] *Common Market Law Reports*, 255, 283.

³ *Recueil de la jurisprudence*, 18 (1972), pp. 356-7; [1972] *Common Market Law Reports*, 949-50.

principle of law forbidding *all* discrimination on grounds of sex, there may be a general principle of law requiring equal pay for men and women; the absence of such a principle from the laws of certain member States of the E.E.C. constitutes a breach of their obligations under Article 119 of the E.E.C. Treaty and under the International Labour Convention No. 100 of 1951, and should therefore be disregarded, it is submitted, in determining whether a general principle of law exists. All the same, it may be questioned whether the right to equal pay is a sufficiently *fundamental* human right to meet the requirement laid down by the Court in cases such as the *Internationale Handelsgesellschaft* case.

It is interesting to compare the judgment of the Court of Justice of the European Communities with judgments of other international administrative tribunals. In the *Mullan* case¹ the United Nations Administrative Tribunal admitted that Rule 107.5 (a) of the Staff Rules concerning home leave was contrary to Article 8 of the Charter, which provides that 'the United Nations shall place no restrictions on the eligibility of men and women to participate . . . *under conditions of equality* in its principal and subsidiary organs' (italics added). Nevertheless the Tribunal decided against the plaintiff, because Staff Rule 107.5 (a) (drawn up by the Secretary-General) was in accordance with the Staff Regulations enacted by the General Assembly and because the plaintiff's contract of employment stated that it was governed by the Staff Regulations and Staff Rules. The Tribunal's judgment is open to criticism. If (as the Tribunal admitted) the Secretary-General is obliged to act in accordance with Article 8 of the Charter when enacting the Staff Rules, how can the General Assembly escape a similar obligation when enacting the Staff Regulations? Moreover the reference to the Staff Regulations and Staff Rules in the contract of employment ought surely to be interpreted to mean those provisions of the Staff Regulations and Staff Rules which are in accordance with the Charter.

A sounder view was taken by the Council of Europe Appeals Board in the *Artzet* case,² in which it refused to apply a resolution of the Committee of Ministers concerning family allowances for officials, on the grounds that the resolution was contrary to a general principle of law forbidding discrimination on grounds of sex, and to the constituent treaty of the Council of Europe, which made respect for human rights a major object of the Council of Europe.

It is uncertain what attitude would be adopted by other international administrative tribunals. Apart from the *Mullan* case, such little authority as there is suggests that the constituent treaty of an international organization overrides Staff Regulations in the event of dispute,³ but not all constituent treaties contain provisions which are relevant to the question of equal pay for men and women. Until recently it was clear that Staff Regulations overrode general principles of law in the event of conflict,⁴ but a few recent decisions point in the opposite direction.⁵ However, it is difficult to argue that

¹ Judgment No. 162 of the U.N. Administrative Tribunal, U.N. Doc. No. AT/DEC/162, 10 October 1972. This case will be reported in a forthcoming volume of the *International Law Reports*.

² Decision No. 8, 10 April 1973. This decision will be reported in a forthcoming volume of the *International Law Reports*.

³ Akehurst, *The Law Governing Employment in International Organizations* (1967), p. 64.

⁴ Akehurst, *ibid.*, pp. 80-1.

⁵ Apart from the *Sabbatini* and *Artzet* cases, reference should be made to the *Ferrechia* case (Judgment No. 203 of the I.L.O. Administrative Tribunal, 14 May 1973), which contains a dictum that the general principle of law whereby a staff member against whom disciplinary proceedings are taken has the right to be heard before a sanction is imposed on him 'must be respected even where contrary provisions exist', and the *K.L.* case (Decision No. 1 of the Appeals

equal pay for men and women is a general principle common to the laws of member States of international organizations other than regional European organizations.

Member States' duty to terminate breaches of E.E.C. Treaty—self-executing provisions and supremacy of Community law

*Case No. 5. Commission of the European Communities v. Italian Republic.*¹ In earlier proceedings between the same parties, the Court had held² in 1968 that Italy, by continuing to levy a tax on the export of works of art, was in breach of Article 16 of the E.E.C. Treaty, which provides:

Member States shall abolish between themselves customs duties on exports and charges having equivalent effect by the end of the first stage [of the transitional period] at the latest.

After the 1968 judgment Italy failed to repeal the law of 1939 which had created the tax, despite repeated urgings by the Commission. After waiting some time³ the Commission instituted new proceedings under Article 169 of the E.E.C. Treaty asking the Court to declare that Italy had broken its obligations under the Treaty by failing to act in accordance with the 1968 judgment.

Italy admitted her obligation to give effect to the 1968 judgment, but pleaded that a succession of political crises had prevented the Italian Parliament repealing the 1939 law. The Advocate-General Roemer argued at some length that political events in Italy did not excuse the delay in giving effect to the 1968 judgment.⁴ The Court, however, found it unnecessary to consider this point, because the Court had held in 1971 that Article 16 of the E.E.C. Treaty was self-executing and created rights for individuals which national courts must protect.⁵

and Arbitration Board of the Franco-German Youth Office, 9 March 1970), which stated that articles in the Staff Regulations forbidding officials to perform political and other acts incompatible with their official duties were not contrary to human rights or general principles of law, thereby suggesting that the articles might have been illegal if they had conflicted with human rights or general principles of law. Both of these cases will be reported in a forthcoming volume of the *International Law Reports*.

¹ *Recueil de la jurisprudence*, 18 (1972), p. 529; [1972] *Common Market Law Reports*, 699.

² See this *Year Book*, 43 (1968-9), p. 259.

³ Proceedings under Article 169 of the E.E.C. Treaty and Article 141 of the Euratom Treaty are not subject to any time limit: *Commission of the European Communities v. French Republic: Recueil de la jurisprudence*, 17 (1971), p. 1003; [1972] *Common Market Law Reports*, 453, 473.

⁴ *Recueil de la jurisprudence*, 18 (1972), pp. 539-40; [1972] *Common Market Law Reports*, 703 et seq.

⁵ *Eunomia di Porro v. Ministry of Public Instruction of the Italian Republic: Recueil de la jurisprudence*, 17 (1971), p. 811; [1972] *Common Market Law Reports*, 4 (this was an action brought by a taxpayer who sought to recover the tax which he had paid on works of art exported from Italy). Only some provisions of the E.E.C. Treaty are self-executing, but every regulation is self-executing, and is capable of creating rights for individuals which national courts must protect, notwithstanding the existence of conflicting municipal laws enacted before or after the regulations (*S.p.A. Marimex v. Ministry of Finance of the Italian Republic: Recueil de la jurisprudence*, 18 (1972), p. 89; [1972] *Common Market Law Reports*, 907). Consequently, if a regulation gives an individual the right to be paid a sum of money by a member State, the payment cannot be postponed by the member State on the grounds that the individual has not complied with requirements fixed by municipal law or on the grounds that the national Parliament has not yet voted the necessary funds (*Leonesio v. Ministry of Agriculture and Forests of the Italian Republic: Recueil de la jurisprudence*, 18 (1972), p. 287; [1973] *Common Market Law Reports*, 343). Likewise national authorities may not apply municipal law so as to exempt an individual from an obligation imposed on him by a Community regulation (*N.V. Granaria Graaninkoopmaatschappij v. Produktschap voor Veevoeder*,

Since Article 16 thus formed part of Italian law, and since Community law must prevail over all conflicting provisions of municipal law, it was unnecessary for the Italian government to persuade the Italian Parliament to repeal the 1939 law; the government could simply have informed its tax-collectors that Article 16 overrode the 1939 law and could have instructed them not to collect the tax. By continuing to collect the tax, Italy had failed to act in accordance with the 1968 judgment and was thus in breach of its obligations under the Treaty.

Nine days before the Court gave judgment, the Italian government informed the Court that it had adopted a decree-law abolishing the collection of the export tax on works of art and providing that taxes paid since 1 January 1962 (the date when Article 16 took effect) would be repaid. In its judgment the Court, instead of giving judgment against Italy, merely took note of the decree-law; however, it ordered Italy to pay the Commission's costs, because the Commission's case had been well founded and because Italy's breach of Article 16 had not come to an end until after the close of the hearings.

Restrictive practices—double jeopardy—effect of fines imposed by non-member States

*Case No. 6. Boehringer Mannheim G.m.b.H. v. Commission of the European Communities.*¹ On 3 July 1969 a United States court fined the appellant company \$80,000 for breaking United States anti-trust law by participating in the international quinine cartel. On 13 July 1969 the Commission of the European Communities fined the appellant 190,000 units of account for breaking Article 85 of the E.E.C. Treaty by participating in the same cartel; on appeal, the fine was reduced to 180,000 units of account by the Court of Justice of the European Communities in 1970.² Meanwhile, on 3 September 1969 the appellant asked the Commission to deduct the amount of the fine paid in the United States from the fine imposed by the Commission. The Commission rejected this request by a decision dated 25 November 1971. The appellant appealed against that decision.

The appellant argued that there was a general principle of law forbidding the cumulative application of two or more punishments for the same offence. The Commission denied that such a principle existed. It also argued in the alternative that the offences punished by the United States fine were not the same as the offences punished by the Commission's fine, so that no question of double jeopardy arose on the facts.

A man who has been prosecuted for a crime cannot be prosecuted again on the same facts in the same State; this rule is accepted almost everywhere. But, after examining the laws of the six member States and of the United States, the Advocate-General Mayras concluded that there was no general principle of law which forbade a State to try a man who had already been tried on the same charge in another State, or which required punishments undergone in one State to be taken into account when punishments for the same offence were imposed in another State.³

Recueil de la jurisprudence, 18 (1972), p. 1163; [1973] *Common Market Law Reports*, 596, 608). Of course, it is possible that a regulation may leave certain points to be governed by (or to be interpreted in accordance with) municipal law, but such a reference to municipal law will not readily be presumed; thus, the Court held that the word 'offer', used in a Community regulation must be interpreted in accordance with Community law and not in accordance with German law (*Hagen OHG v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, *Recueil de la jurisprudence*, 18 (1972), p. 23; [1973] *Common Market Law Reports*, 35).

¹ *Recueil de la jurisprudence*, 18 (1972), p. 1281.

² *Ibid.*, 16 (1970), p. 769. See also this *Year Book*, 45 (1971), p. 424.

³ *Recueil de la jurisprudence*, 18 (1972), pp. 1297-1302.

If this was so in the case of criminal law, said the Advocate-General, there were even stronger reasons for giving States a similar freedom of action in the realm of anti-trust law. In criminal law the rule against double jeopardy was designed to protect the individual's liberty against imprisonment, but such considerations were irrelevant to the Community's rules against restrictive practices, where the sanctions consisted of *finés* imposed on *companies*.¹ Furthermore, according to French and German law, the imposition of a disciplinary or administrative sanction did not prevent the subsequent imposition of a criminal sanction in the same State, and vice versa.² (The significance of this argument lies in the fact that the appellant had been fined in criminal proceedings in the United States and in administrative proceedings before the Commission of the European Communities.)

However, in the earlier case of *Wilhelm v. Bundeskartellamt*, the Court of Justice of the European Communities had ruled that restrictive practices could be punished both by Community authorities applying Community law and by the authorities of member States applying national law, but that sanctions imposed by the authorities who happened to act first must, because of 'a general requirement of equity', be taken into account by the other authorities when they came to impose their own sanctions.³ The efforts made by the Commission and by the Advocate-General to distinguish this ruling, and to suggest that the Commission need not take into account sanctions imposed by non-member States, are not very convincing. For instance, the Advocate-General said that there was no guarantee of reciprocity on the part of non-member States.⁴ But the ruling in the *Wilhelm* case was based on 'a general requirement of equity', and reciprocity between States has nothing to do with justice between individuals.

In the present case the Court echoed the *Wilhelm* case by saying that the Commission was obliged to take into account sanctions imposed previously by member States. The Court found it unnecessary to decide whether the same rule applied to sanctions imposed previously by non-member States, because it held that the offences punished by the Commission's fine were not the same as the offences punished by the United States fine.⁵ Although both sets of offences arose out of the same network of agreements, they were essentially different. The Commission had fined the appellant mainly for allocating markets in the E.E.C. and in the United Kingdom, and for preventing the production of synthetic quinidine in France. The United States court may have taken these practices into account, but it was much more concerned with the fixing of prices for sales by the appellant and other members of the cartel in the United States, and with the acquisition and distribution of the United States strategic stockpile of quinine by the appellant and others. Admittedly, the fact that the appellant had entered a plea of *nolo contendere* in the United States court made it difficult to ascertain the

¹ Ibid., pp. 1302-3.

² Ibid., p. 1297.

³ Ibid., 15 (1969), p. 1, at p. 16; [1969] *Common Market Law Reports*, 100, 120. See also this *Year Book*, 44 (1970), p. 227.

⁴ *Recueil de la jurisprudence*, 18 (1972), p. 1303.

⁵ The Advocate-General Mayras argued (ibid., p. 1303) that no State claimed jurisdiction over restrictive practices unless the practices had effects on its territory; such effects were a constituent element of the offence, and consequently the constituent elements of an offence punished by the Commission could *never* be the same as the constituent elements of an offence punished by a non-member State. This attempt to make the problem of double jeopardy disappear is ingenious, but it presupposes that the Commission's power to impose fines cannot be limited unless the constituent elements of the two offences are the same. Such a presupposition is unjustified; it is possible to imagine a rule limiting the Commission's power to impose fines whenever the physical act giving rise to the two offences is the same. In such cases the problem of double jeopardy would reappear, because a single physical act can cause effects in more than one country.

precise scope of the offences for which the appellant had been fined, because the offences were described in very general terms in the indictment, and because there had been no real trial to clarify the issue. But the Court of Justice of the European Communities held that the onus was on the appellant to prove that the two sets of offences were identical, and that the appellant had been unable to do this.

The appellant company argued that both the Commission and the United States court had punished it for being a party to the agreement setting up the cartel. The Court of Justice of the European Communities rejected this argument; the Commission had fined the appellant, not for being a party to the agreement, but for applying the agreement in a way which was capable of affecting trade between member States and of distorting competition within the Common Market; in 1970 the Court had reduced the fine because it considered that the agreement had not been applied as consistently as the Commission had believed. The appellant produced no evidence that the United States fine had been based on applications or effects of the agreement other than those which had occurred in the United States.

Since the appellant had not proved that the two sets of offences were identical, the Court dismissed the appeal.

Restrictive practices—concerted practices—price rings—extra-territorial application of anti-trust laws

Case No. 7. Imperial Chemical Industries Ltd. v. Commission of the European Communities (the *Dyestuffs* case).¹ In 1964 many companies producing dyestuffs increased their prices by 15 per cent; the dyestuffs affected by the price rise were virtually the same for all the companies concerned, and each company brought the price rise into effect at roughly the same time. Further rises, marked by a similar degree of uniformity, occurred in 1965 and 1967. After investigating the situation, the Commission of the European Communities decided that the price rises were the result of a concerted practice by the companies concerned, and imposed fines on ten of them. Nine of the companies appealed to the Court (unsuccessfully, as it turned out). Although the Court dealt with the appeals in separate judgments, there is a considerable degree of similarity between the judgments, and consequently the present note will concentrate upon one of the judgments and make only brief references to the others.

The Court began by rejecting various procedural arguments put forward by I.C.I. to challenge the Commission's decision. The points in issue are too narrow to be discussed in the present note, with the exception of I.C.I.'s argument that the Commission's decision was invalid because it had been notified to I.C.I.'s German subsidiary and not to I.C.I. I.C.I. relied on the second paragraph of Article 191 of the E.E.C. Treaty, which provides that '... decisions shall be notified to those to whom they are addressed and shall take effect upon such notification'. But the Court held that irregularities in the notification of a decision cannot affect the validity of such a decision; the most they can do is to prevent time running against the party concerned.² Here the Court cited the last paragraph of Article 173 of the E.E.C. Treaty, which provides that 'proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be'; since I.C.I. had had actual notice of the Commission's decision and had appealed against it in good time, the Court dismissed I.C.I.'s argument as moot.

¹ *Recueil de la jurisprudence*, 18 (1972), p. 619; [1972] *Common Market Law Reports*, 557.

² This aspect of the Court's decision is criticized by Steindorff in *Common Market Law Review*, 9 (1972), p. 502, at pp. 503-4.

A related point was raised in the appeal by the Swiss Company Geigy, which argued that the list of charges issued by the Commission during the administrative investigation preceding its decision was void, because it had been served on Geigy by post in Switzerland, in violation of Swiss sovereignty.¹ The Court admitted that the list of charges ought to be communicated in a manner which respected Swiss sovereignty, but found, on the facts, that there was no method of communication which was acceptable to the Swiss government; the Court therefore held that international law could not be invoked to deny the Community the power to act effectively against 'les comportements préjudiciables à la concurrence qui se sont manifestés dans le marché commun'. After this disquieting reliance on the maxim that necessity knows no law, the Court pointed out that the purpose of the list of charges was to enable the accused to defend himself against those charges; consequently, provided that he had actual notice of the list of charges, the fact that the list was communicated to him in a non-member State did not invalidate the subsequent procedure.²

I.C.I. also argued that the Commission's investigation into the price rise in January 1964 was time-barred because it had not begun until 31 May 1967. The Court held that it was for the legislature, not for the Court, to fix a time-limit. This repeated the ruling made by the Court in the *Chemiefarma* case,³ but the Court broke new ground by adding that indefinite delay by the Commission in exercising its powers would violate the principle of security in legal relations (*sécurité juridique*, *Rechtssicherheit*); however, the Court held that the delay in the present case had not been excessive.⁴

The Court then turned to the question of substance—whether the companies concerned were guilty of concerted practices. This was the first time that the Court had considered concerted practices and, no doubt, wishing to leave room for flexibility in future judgments, the Court did not give an all-embracing definition of concerted practices. However, the Court did make some interesting remarks about concerted practices in general:

If Article 85 distinguishes the concept of 'concerted practice' from that of 'agreements between enterprises' or 'decisions of associations of enterprises', this is done with the object of bringing under the prohibitions of this Article a form of co-ordination between undertakings which, without going so far as to amount to an agreement properly so called, knowingly substitutes a practical co-operation between them for the risks of competition.

By its very nature, then, the concerted practice does not combine all the elements of an agreement, but may, *inter alia*, result from a co-ordination which becomes apparent from the behaviour of the participants.

Although a parallelism of behaviour cannot by itself be identified with a concerted practice, it is nevertheless liable to constitute a strong indication of such a practice when it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the importance and number of the undertakings and the volume of the said market. Such is the case especially where the parallel behaviour is such as to permit the parties to seek price equilibrium at a different level from that which would have resulted from competition, and to crystallize the status quo to the detriment of effective freedom of movement of the products in the Common Market and free choice by consumers of their suppliers.

¹ For an example of the attitude of the Swiss government on such matters, see *American Journal of International Law*, 56 (1962), p. 794; and see, generally, Mann, *Recueil des cours*, 111 (1964), p. 9, at pp. 133-4. And see above, pp. 146-7.

² *Recueil de la jurisprudence*, 18 (1972), p. 787, at pp. 825-6; [1972] *Common Market Law Reports*, 637-8.

³ See this *Year Book*, 45 (1971), pp. 425-6.

⁴ This point was considered more fully by the Advocate-General Mayras, *Recueil de la jurisprudence*, 18 (1972), pp. 708-9; [1972] *Common Market Law Reports*, 614-6.

The question whether there was a concerting in the present case, therefore, can only be appraised correctly if the indications relied on by the challenged Decision are considered not in isolation but as a whole, having regard to the characteristics of the market in the products in question.

The Court then examined the special features of the market in dyestuffs. The plaintiffs argued that the price rises were the natural result of the special features; the market was oligopolistic and profits were in continual danger of erosion as a result of rebates being granted to customers, and consequently a price rise by a price-leader would naturally be followed by other producers, without justifying any inference that the producers raising their prices were acting in concert with one another. The Court nevertheless held that there had been a concerted practice. In 1964 the companies had followed the lead of the price-leader with astonishing speed, increasing their prices in four countries by an identical percentage for an almost identical range of goods within the space of two or three days; in 1965 and 1967 meetings of all the producers had taken place, at which the price-leaders had informed the other companies in advance about the price rises; in most cases all the companies had raised their prices by identical amounts, despite the probability that a company refusing to join in the price-rise could have increased its sales at the expense of the others; the price rises had been the same in percentage terms in different member States, despite the fact that pre-existing prices differed from State to State. There was thus a strong inference that the companies had not been reacting spontaneously to the actions of a price-leader, but had been deliberately co-operating with one another. The Court therefore concluded:

While it is permissible for each manufacturer to change his prices freely and to take into account for this purpose the behaviour, present and foreseeable, of his competitors, it is, on the other hand, contrary to the competition rules of the Treaty for a manufacturer to co-operate with his competitors, in whatever manner, to determine a co-ordinated course of action relating to an increase in prices, and to ensure its success by the prior elimination of all uncertainty as to mutual behaviour relating to the essential elements of this action, such as rates, subject matter, date and place of the increases.

In these circumstances, having regard to the characteristics of the market in these products, the behaviour of the applicant, in conjunction with other undertakings against whom proceedings have been taken, was designed to substitute for the risks of competition, and the hazards of their spontaneous reactions, a co-operation which amounts to a concerted practice prohibited by Article 85 (1) of the Treaty.

One of the conditions which must be fulfilled before a concerted practice is prohibited by Article 85 (1) is that the practice is capable of affecting trade between member States. I.C.I. argued that this condition was not met; despite marked differences between prices in different member States, customers preferred to buy from local suppliers, in order to ensure speed and certainty of delivery and skilled after-sales service. Nevertheless the Court held:

The uniform and simultaneous character of the increases served, in particular, to freeze the status quo by avoiding any erosion of the clientèle of each enterprise, and thus contributed to preserving the 'cemented' character of the traditional national markets in the goods, to the detriment of effective freedom of movement of the products in the Common Market.

In other words, although the concerted practices had not caused the isolation of national markets, they had helped to preserve it at a time when price competition might have undermined it. Indeed, as the Advocate-General Mayras pointed out, an

Italian company which had not participated in the 1965 price rise had increased its exports to Germany as a result.¹

Finally, the Court dealt with the problem of the extra-territorial application of Article 85 of the E.E.C. Treaty. With respect to most of the plaintiff companies no problem arose, because they had their head offices inside the E.E.C., but the Commission claimed jurisdiction over I.C.I., a British company (this was before the United Kingdom joined the E.E.C.), and over certain Swiss companies on the grounds that their activities had produced effects within the E.E.C. In their appeals, I.C.I. and the two Swiss plaintiffs argued that international law did not allow the Commission to base its jurisdiction on effects felt within the Community as a result of acts done outside the Community.² With respect, it is submitted that this argument, had it been accepted by the Court, would not have helped the plaintiffs, because the export of dye-stuffs from England or Switzerland to the E.E.C. is an act which occurs in the E.E.C. as well as in England or Switzerland; I.C.I.'s attempt to avoid this conclusion by relying on the fact that the contracts were governed by English law³ must be rejected, because otherwise businessmen could evade the law of the State or States primarily concerned by choosing the law of the State with the mildest system of anti-trust law.

The Advocate-General Mayras submitted that the 'effects doctrine' was in accordance with international law, provided that the effects were direct, immediate, reasonably foreseeable and substantial.⁴ Part of his reasoning is open to criticism; for instance, the 'effects doctrine' is not as clearly reflected in some systems of municipal law as he suggested,⁵ and his conclusion⁶ that anti-trust law meets the requirement laid down in section 18 (a) of the Restatement of Foreign Relations Law that 'the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems' overlooks the fact that the rules of anti-trust law vary enormously from country to country and scarcely exist in many countries, including Italy and Luxembourg (even West Germany, which has a very strict anti-cartel law, prohibits only agreements and not concerted practices). But, for reasons which the author has stated elsewhere,⁷ it is submitted that the 'effects doctrine', limited in a way similar to that suggested by the Advocate-General, is a more accurate statement of international law and provides a fairer and more workable rule than the views put forward by I.C.I.

The Court did not deal with this issue.⁸ Instead, it held that I.C.I.'s subsidiary

¹ *Recueil de la jurisprudence*, 18 (1972), p. 691; [1972] *Common Market Law Reports*, 591.

² *Recueil de la jurisprudence*, 18 (1972), pp. 624-7, 631-2.

³ *Ibid.*, pp. 626, 631.

⁴ *Ibid.*, pp. 692-703; [1972] *Common Market Law Reports*, 593-608.

⁵ *Recueil de la jurisprudence*, 18 (1972), pp. 694-7; [1972] *Common Market Law Reports*, 595-600.

⁶ *Recueil de la jurisprudence*, 18 (1972), p. 700; [1972] *Common Market Law Reports*, 604.

⁷ See above, pp. 192-201.

⁸ It is true that the Court said 'it is first necessary to ascertain whether the behaviour of the applicant [I.C.I.] manifested itself in the Common Market', but it is submitted (*pace* Steindorff in *Common Market Law Review*, 9 (1972), p. 506) that the words 'manifested itself' ('s'est manifesté', or 'aan den dag is getreden' in the original Dutch) are too ambiguous to indicate whether the plaintiff's behaviour must actually take place in the Common Market or whether it need only produce effects there. See also Mann in *International and Comparative Law Quarterly*, 22 (1973), p. 35, at p. 46, note 41.

The Court's judgment in *Béguelin Import Co. v. S.A.G.L. Import Export* (*Recueil de la jurisprudence*, 17 (1971), p. 949, at p. 959; [1972] *Common Market Law Reports*, 81, 95; see below, p. 461 contains a dictum supporting the 'effects doctrine', but the Court did not consider whether the 'effects doctrine' was in accordance with international law; the case concerned an agreement

companies in the E.E.C. had been acting on I.C.I.'s orders when they raised the selling prices of the dyestuffs which they bought from I.C.I. and sold in the E.E.C., and that therefore I.C.I. was liable for their acts. *Qui facit per alium facit per se* is an unexceptionable principle, but the Court seems to have assumed that the mere fact that a subsidiary is a subsidiary raises a presumption that it is acting on the instructions of the controlling company, and the Court required very little evidence to confirm that presumption; it found that I.C.I. had sent telex messages to its subsidiaries ordering them to increase their prices in 1964 (the text of the messages is nowhere reproduced in the judgment), and then said that the same must be presumed to have happened in 1965 and 1967 in the absence of evidence to the contrary. Although it may be misplaced to treat proceedings under Article 172 of the E.E.C. Treaty as if they were criminal proceedings, with a heavy onus of proof on the Commission, as advocated by Dr. Mann,¹ there cannot be any justification for presuming the guilt of the plaintiff, as the Court in effect did in the case of I.C.I.

It is unfortunate also that the Court did not deal with the real problem of the extra-territorial application of Article 85. This is a problem which is likely to recur. Sooner or later the Court will have to consider the effects inside the E.E.C. of restrictive practices carried on in non-member States such as Japan and the United States. The problem is also likely to arise in another context, because *S. A. Brasserie de Haecht v. Wilkin-Janssen* (No. 2)² makes far-reaching distinctions between restrictive business agreements which were in existence before Regulation 17 came into force and those concluded subsequently, and the question whether Regulation 17 came into force in respect of agreements between businesses in the new member States when those member States joined the E.E.C. on 1 January 1973, or whether such agreements were subject to Regulation 17 before that date, can only be answered by defining the extra-territorial scope of the E.E.C. rules on restrictive business practices.

Restrictive practices—price fixing—effect on trade between member States

*Case No. 8. Vereeniging van Cementhandelaren v. Commission of the European Communities.*³ The Vereeniging van Cementhandelaren, founded in 1928, was an association to which the majority of Dutch cement-dealers belonged. In 1962 it notified its rules to the Commission of the European Communities and applied for exemption under Article 85 (3) of the E.E.C. Treaty. After investigations and discussions, the Commission issued a decision on 16 December 1971 finding that some of the rules were contrary to Article 85 (1), refusing exemption under Article 85 (3) and ordering the Vereeniging to put an immediate end to its breach of Article 85 (1). The Vereeniging applied to the Court to annul this decision.

Originally the Vereeniging required its members to charge fixed prices for sales of less than 100 tons of cement, and recommended the prices which they should charge for larger amounts. Nine days before the Commission's decision the Vereeniging abolished the system of fixed prices. The Commission's decision was aimed against the

between a Japanese manufacturer and an E.E.C. distributor which prevented exports from one member State to another, and, whatever view one takes of the restrictions imposed by international law on the extra-territorial application of anti-trust law, clearly no rule of international law excluded E.E.C. jurisdiction over such an agreement. Similar considerations apply to previous decisions by the Commission; see above, p. 197.

¹ Loc. cit. (above, p. 455 n. 8), at pp. 38-40.

² [1973] E.C.R. 77; [1973] *Common Market Law Reports*, 287. This case will be noted in the next issue of this *Year Book*.

³ *Recueil de la jurisprudence*, 18 (1972), p. 977; [1973] *Common Market Law Reports*, 7.

system of fixed prices and against the system of recommended prices, and the Vereeniging now argued that the two systems were so interconnected that the decision should be annulled, so that the Commission could consider the legality of the system of recommended prices, standing on its own. The Court rejected this argument, holding that the Vereeniging knew, at the time when it abolished the system of fixed prices, that a decision from the Commission was imminent; having failed to warn the Commission in good time that it was about to abolish the system of fixed prices, the Vereeniging could not plead such abolition as a ground for attacking the Commission's decision.

The Court also rejected the Vereeniging's argument that the Commission's decision was illegal because the list of charges (a document served on the Vereeniging by the Commission during the investigation preceding the decision) had been signed by an official of the Commission, instead of a member of the Commission. The Court held that the relevant member of the Commission had approved the contents of the list of charges and had merely delegated the power to *sign* it to an official; the implication is that delegation of the power to determine the contents of the list of charges would have been illegal.

On the merits, the Vereeniging argued that the system of recommended prices was lawful because members of the Vereeniging were at liberty to disregard the recommended prices and often did so. Nevertheless the Court held that a system of recommended prices was just as illegal as a system of fixed prices.

It could not be supposed that the clauses of the agreement relating to the determination of 'recommended prices' are devoid of all useful effect. Indeed the fixing of a price even simply recommended affects competition by the fact that it permits all the participants to foresee with a reasonable degree of certainty what the price policy of their competitors will be. That foresight is all the more certain in that to the 'recommended prices' provision is attached the obligation to make a demonstrable profit in all cases and these provisions must in addition be considered in the context of the whole of the internal regulations of the applicant association which are characterized by a rigorous discipline supported by inspections and sanctions.

Apart from the fixing of prices properly so called, the agreement covered by the decision under appeal contains a further batch of restrictive clauses concerning other contractual conditions. Such is the case *inter alia* with the clauses which have the object of preventing the sale of cement to traders other than members of the association or re-sellers authorized by it, of preventing the creation of cement stocks in the hands of third parties who are not subject to the discipline of the association, of strictly limiting the commercial advantages which could be conceded to purchasers and preventing any provision of services to customers which fall outside the bounds of what is considered 'normal'. Thus an examination of the whole of the regulations contained in the decision under appeal brings them out as forming a coherent and rigorously organized system which has the object of restricting competition between the members of the association.

One of the conditions which must be fulfilled before a restrictive practice is prohibited by Article 85 (1) is that it is capable of affecting trade between member States. The Vereeniging argued that this condition was not met; all the members of the Vereeniging were Dutch and the rules of the Vereeniging were concerned only with sales on Dutch territory, not with imports or exports. Moreover, a large minority of Dutch cement-dealers were not members of the Vereeniging, and a third of the cement used in the Netherlands was imported. Nevertheless, the Court held that trade between member States was affected:

An agreement which extends to the whole of the territory of a member State has, by its very nature, the effect of consolidating a national partitioning thus hindering the economic

interpenetration to which the Treaty is directed and ensuring a protection for the national production. More particularly, the restrictive provisions by which the members of the applicant association are bound as well as the exclusion by the association of all sales to re-sellers who are not authorized by it make more difficult the activity or the penetration on the Dutch market of producers or sellers from the other member States.

One has to turn to the pleadings to see how the Court arrived at this conclusion. Most Dutch cement-dealers were members of the Vereeniging, and consequently foreign manufacturers of cement, in order to sell more than a small quantity in the Netherlands, had to sell it through members of the Vereeniging; because the rules of the Vereeniging restricted competition between its members and tended to fix the terms on which they bought and sold cement, the Vereeniging prevented foreign manufacturers from offering attractive terms to Dutch consumers and from thereby increasing their share of the Dutch market.

Finally, the Vereeniging argued that the Commission's decision contained an insufficient statement of reasons. The rules which the Commission's decision found to be illegal were contained in several different documents, but the decision gave reasons for the finding of illegality only with respect to some of these documents. The Court dismissed this objection, holding that the documents were interconnected and contained cross-references to one another; the Court presumably thought that the reasons stated by the Commission for objecting to some of the documents had been intended by the Commission to be equally applicable to the other documents.

Restrictive practices—trade marks

*Case No. 9. Sirena v. Eda.*¹ In 1931 a United States company registered a trade mark in Italy; six years later it sold its Italian trade mark to the plaintiff. The United States company also granted to a German company the right to use the same trade mark in West Germany. When the defendants imported into Italy goods manufactured by the German company and bearing the trade mark in question, the plaintiff sued them in Italy for infringing his trade mark. The defendants pleaded Articles 85 and 86 of the E.E.C. Treaty as a defence, and the Italian court asked the Court of Justice of the European Communities, under Article 177 of the Treaty, to answer the following questions:

1. Do Articles 85 and 86 of the E.E.C. Treaty apply to the effects of an agreement assigning a trade mark made before the entry into force of the Treaty?
2. Must the aforesaid Articles 85 and 86 be interpreted to the effect that they prevent the owner of a trade mark validly registered in one member State from exercising the corresponding absolute right to prohibit third parties from importing from other member States of the Community products bearing the same trade mark originally lawfully affixed [légalement apposée à l'origine]?

The Court of Justice of the European Communities began by pointing out that the national rules on trade marks had not yet been unified in the Community, and that

¹ *Recueil de la jurisprudence*, 17 (1971), p. 69; [1971] *Common Market Law Reports*, 260. For a similar case on patents, see *Parke, Davis and Co. v. Probel*: *Recueil de la jurisprudence*, 14 (1968), p. 81; [1968] *Common Market Law Reports*, 47, 58-61; this *Year Book*, 43 (1968-69), p. 256. However, the Court would probably take a stricter attitude towards trade marks than it would towards patents; in *Sirena v. Eda* it said that trade marks were not so worthy of protection as patents: *Recueil de la jurisprudence*, 17 (1971), p. 82; [1971] *Common Market Law Reports*, 273. See also the remarks of the Advocate-General: *Recueil de la jurisprudence*, 17 (1971), pp. 87-8; [1971] *Common Market Law Reports*, 264-5. And see below, p. 460, n. 7.

therefore differences between the national rules were capable of impeding the free movement of goods and the free play of competition. The Court seemed to think that such impediments were inevitable and not necessarily contrary to the E.E.C. Treaty. However, the Court also referred to Article 36 of the Treaty, which provides, *inter alia*, that prohibitions and restrictions on the importation of goods may be justified by the need to protect trade marks, provided that such prohibitions and restrictions do not constitute a means of arbitrary discrimination or a disguised restriction on trade between member States. Article 36 appears in the chapter of the Treaty dealing with quantitative restrictions on trade between member States, but the Court considered that it reflected a more general principle which was equally applicable to the rules on restrictive practices; consequently, although the *existence* of trade marks was not affected by Articles 85 and 86, the *use* to which they were put might fall foul of those articles. If this were not so, said the Court, trade marks could be used very easily to divide up markets, thereby restricting the free movement of goods which was an essential feature of the Common Market.

Article 85 (1) of the E.E.C. Treaty forbids all agreements between undertakings, all decisions by associations of undertakings and all concerted practices, which are capable of affecting¹ trade between member States and whose purpose or effect is to prevent, restrict or distort competition. After recalling the terms of Article 85 (1), the Court emphasized again the distinction between the existence of trade marks and the use to which they were put.

Trade marks rights, as a legal concept, do not per se possess the characteristics of the contract or concerted act envisaged by Article 85 (1). Nevertheless, their exercise may come within the prohibitions of the Treaty if it is the object, the means or the consequence of an agreement [*entente*]. . . .

Such situations may arise in particular from agreements between trade mark owners or their assignees, agreements which enable them to prevent imports from other member States. The simultaneous assignment to several concessionaires of national trade mark rights for the same product, if it has the effect of re-establishing rigid frontiers between member States, may prejudice trade between States and distort competition in the Common Market. . . .

Article 85 therefore applies where, by virtue of trade mark rights, imports of products originating in other member States, bearing the same trade mark because their owners have acquired the trade mark itself or the right to use it through agreements [*accords*] with one another or with third parties, are prevented.

The Court added that it made no difference if national law regarded the trade marks as being derived from something other than the agreements in question (e.g. from registration or peaceful enjoyment). Nor did it matter that the agreements were made before the Treaty came into force, so long as they continued to produce effects after that date.

Article 86 of the E.E.C. Treaty forbids 'any abuse by one or more undertakings of a dominant position within the Common Market or in a substantial part of it in so far as it may affect trade between member States'. All three requirements—dominant position, abuse and possibility of affecting trade between member States—had to be fulfilled before Article 86 applied, said the Court. The fact that the owner of a trade mark could prevent other parties from selling goods bearing the trade mark in the territory of a member State did not necessarily mean that he held a dominant position;

¹ Later in its judgment the Court said that a restrictive practice would not fall foul of Article 85 unless it affected trade between member States *noticeably*.

quite apart from the problem of deciding whether the territory of a member State constituted a 'substantial part' of the Common Market (a problem which the Court made no attempt to answer), the existence of a dominant position could be proved only by taking additional factors into account, e.g. the absence of competition from other goods not bearing the trade mark.

As for the concept of abuse, the Court held that the high price of goods covered by a trade mark did not automatically constitute sufficient proof of abuse, but that it might become so, in view of its size, if it did not seem objectively justified.¹

The principles laid down by the Court in *Sirena v. Eda* were carried a stage further by its subsequent judgment in *Deutsche Grammophon v. Metro-SB-Grossmärkte GmbH*.² The plaintiff company manufactured gramophone records in Germany and inserted a resale price maintenance clause in all its contracts with its German customers; it allowed the same records to be sold at a lower price abroad. The defendant bought some of the records from a French customer of the plaintiff and resold them in Germany at a price below the minimum retail price fixed by the plaintiff company in its contracts with its German customers. The plaintiff company, relying on its copyright in the records, brought an action in the courts to restrain the defendant from reselling the records in Germany; the defendant pleaded various rules of Community law as a defence, and the German court referred the case to the Court of Justice of the European Communities for a preliminary ruling under Article 177.

As far as Articles 85 and 86 are concerned, the Court's ruling in the *Deutsche Grammophon* case adds little to its ruling in *Sirena v. Eda*. However, the Court broke new ground by saying that the use of copyright in order to prevent cut-price reimports, even if it was not contrary to Articles 85 and 86, might still be contrary to other provisions of the E.E.C. Treaty, particularly Article 36.

Although Article 36 permits prohibitions or restrictions on the free movement of goods that are justified for the protection of industrial and commercial property, it only allows such restrictions on the freedom of trade to the extent that they are justified for the protection of the rights that form the specific object of this property.

If a protection right analogous to copyright is used in order to prohibit in one member State the marketing of goods that have been brought onto the market by the holder of the right or with his consent in the territory of another member State, solely because [*au seul motif que*] this marketing has not occurred in the domestic market, such a prohibition, maintaining the isolation of national markets, conflicts with the essential aim of the Treaty, [namely,] the integration of national markets into one uniform market.

This essential aim of the Treaty could not be achieved, said the Court, if legal rules in member States enabled the subjects of those States to divide up the market and produce arbitrary discrimination or a disguised restriction on trade between member States.

It is submitted that this line of reasoning, relying on Article 36, is preferable to the Court's previous attempts to stretch the scope of Article 85. In *Sirena v. Eda* the only link between Article 85 and the abuse of the trade marks was the fact that the trade marks were acquired by virtue of agreements; the abuse of the trade marks was caught by Article 85 because it was the result of the agreements assigning the trade marks. But Article 85 is drafted in such a way that it is impossible to treat the results of such agreements as unlawful without treating the agreements themselves as unlawful.

¹ In the *Parke, Davis* case the Court adopted a less severe approach towards patents, saying that the high price of patented goods, compared with non-patented goods, was not necessarily evidence of abuse; see this *Year Book*, 43 (1968-9), p. 258.

² *Recueil de la jurisprudence*, 17 (1971), p. 487; [1971] *Common Market Law Reports*, 631.

If a trade mark is assigned in 1931, it is absurd to treat the agreement as unlawful because the assignee uses the trade mark in 1971 in a manner prohibited by the E.E.C. Treaty; one might as well treat the sale of a chair as unlawful because the buyer uses the chair to hit his neighbour over the head. In both cases the unlawful act is, in a sense, an effect of the agreement; but the effect is much too indirect and remote to reach back and invalidate the agreement. It is to be hoped that future cases will avoid such faulty reasoning and rely instead on the interpretation of Article 36 given in the *Deutsche Grammophon* case.

On the other hand, increased reliance on Article 36 could cause practical difficulties. Article 36 is not drafted in detailed terms, and it may be difficult for the holder of industrial or commercial property rights to know whether his conduct is contrary to Article 36. If Article 85 applied, he could ask the Commission to issue a negative clearance under Regulation 17; but no similar machinery exists in the case of Article 36. No doubt the resulting uncertainty will be resolved in the course of time by judicial decisions, but in the meantime the boundaries between lawful and unlawful behaviour will often be hard to ascertain, which is not a desirable state of affairs.

Restrictive practices—exclusive distributor agreements

*Case No. 10. Béguelin Import Co. v. S.A.G.L. Import Export.*¹ On March 1967 Béguelin Import Co., a Belgian company, made an agreement with Oshawa, a Japanese company, whereby it became exclusive distributor throughout Belgium and France of cigarette lighters manufactured by Oshawa. Shortly afterwards Béguelin Import Co. transferred its right to act as exclusive distributor in France to its subsidiary Béguelin Import Co. France; this arrangement was confirmed by a contract between Oshawa and Béguelin Import Co. France.

In Germany Gebrüder Marbach enjoyed similar rights under a contract with Oshawa. In 1969 the defendant bought 18,000 Oshawa cigarette lighters from Gebrüder Marbach and imported them into France. The plaintiffs brought an action in a French court to restrain the defendant from reselling the lighters in France. The defendant pleaded various rules of Community law by way of defence, and the French court referred the case to the Court of Justice of the European Communities for a preliminary ruling under Article 177 of the E.E.C. Treaty.

Firstly, the defendant argued that the formation of a French subsidiary company by the Belgian company, and the transfer to the French company of the Belgian company's exclusive rights over the French market, were contrary to Article 85 of the E.E.C. Treaty. The Court rejected this argument; Article 85 applied only to restrictive practices which had the object or effect of obstructing competition, and an agreement between a parent-company and its wholly owned subsidiary could not reduce the amount of competition which would have occurred in the absence of such agreement, because it would be unrealistic to expect a wholly owned subsidiary to compete with its parent-company in any case; the subsidiary had a separate legal personality, but no *economic* independence, and the absence of economic independence was the crucial factor.

On the other hand, the Court held that the fact that one of the companies participating in the agreement (Oshawa) was situated outside the E.E.C. did not, by itself, prevent Article 85 applying, if the agreement produced its effects within the Common Market.²

¹ *Recueil de la jurisprudence*, 17 (1971), p. 949; [1972] *Common Market Law Reports*, 81.

² See above, p. 455 n. 8.

The Court went on to say that an exclusive distributor agreement would be contrary to Article 85 if, in law or in fact, it prevented the distributor re-exporting the relevant goods to other member States, or prevented such goods being imported from other member States into the protected area and being sold there by persons other than the distributor or his clients. In order to answer this question, it was necessary to look, not only at the terms of the contract, but also at such things as the existence of similar agreements made by the same producer with distributors established in other member States. An exclusive distributor agreement was capable of obstructing competition if the distributor was able to prevent parallel imports from other member States into his protected area as a result of a combination of the agreement and of municipal law on unfair competition; the distributor therefore had no right to invoke such law if the allegedly 'unfair' acts by his competitors consisted solely of parallel imports. The Court added:

Finally, to bring into play the prohibition set out in Article 85, the agreement must affect noticeably the trade between member States and competition.

In judging whether that is the case, these factors should be placed in the real context in which they would be in the absence of the agreement in the case.

Consequently, in judging whether a contract containing a clause granting an exclusive right of sale is justiciable under that Article, account should be taken *inter alia* of the nature and limited or unlimited quantity of the products covered by the agreement, the position and importance of the grantor, the position and importance of the concessionaire on the market in the products in question, the isolated nature of the agreement in question or its place among a network of agreements, the severity of the clauses intended to protect the exclusive right or the possibilities left open to other commercial dealings in the same products through re-export or parallel imports.

After holding that the exemption granted by Regulation 67/67 to certain categories of restrictive practices did not apply to agreements forbidding the distributor to re-export the relevant goods to other member States, the Court considered the effect of Article 85 (2) of the E.E.C. Treaty. Article 85 (2) provides that agreements and decisions prohibited under Article 85 are void (E.E.C. regulations and the Court's own judgments have read certain exceptions into this rule, but none of them was applicable to the present case). The Court held that the nullity referred to in Article 85 (2) had an absolute character, and that an agreement void by virtue of Article 85 (2) had no effect in relations between the contracting parties and could not be invoked against third parties.

Finally, the plaintiffs argued that the defendant company was itself distorting competition inside the Common Market by importing lighters from Germany into France, because the lighters imported by the plaintiff did not carry the same guarantees of after-sales service as the lighters distributed by the plaintiffs. However, the Court ruled that the act of importing or exporting did not, as such, have the object or effect of impairing competition within the meaning of Article 85.

MICHAEL AKEHURST

DECISIONS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS DURING 1971–1972*

A. DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS

Right to take proceedings to test the legality of arrest or detention (Article 5 (4))—competence of the Court to rule on questions concerning Article 26—the Court's relationship with the Commission—objections as to admissibility not raised before the Commission—an effective remedy for the purposes of Article 26

Case No. 1. *De Wilde, Ooms and Versyp* cases ('The Vagrancy cases') (Merits).¹ The applicants in these three cases, which were referred to the Court by Belgium, the respondent State, were Belgian nationals who had been detained as vagrants in public institutions in Belgium during the years 1965 to 1967 for periods ranging from about seven months to about one year and nine months. They had gone separately and of their own volition to police stations and, in effect, surrendered themselves as vagrants. They were arrested and taken before magistrates who ordered their detention in accordance with Belgian law. Under Belgian law, 'simple' vagrancy is not a crime; persons living in such a state are, however, subject to detention. A person believed by the police to be a vagrant must be arrested and brought before a magistrate within 24 hours. The magistrate's task is first to ascertain his identity, age, physical and mental state and manner of life. If he finds the person to be living in a state of vagrancy and doing so 'through idleness, drunkenness or immorality', he is obliged to order that person's detention in a vagrancy centre for a period of from two to seven years. If he finds the person to be a vagrant but with none of the above aggravating factors applying, he may, in his discretion, order that person's detention in an assistance home for an indeterminate period not exceeding one year. Detention in a vagrancy centre, but apparently not detention in an assistance home, is entered on a person's criminal record. Detention in either kind of institution entails certain electoral disqualifications. In all cases, the detention of vagrants is supervised by the Belgian Minister of Justice who may, in his discretion, order a person's early release. A person detained in an assistance home has a right to release within a year in certain circumstances. In the *De Wilde* and *Versyp* cases, the applicants were ordered to be detained in vagrancy centres for periods of two years, although each was released by the Minister of Justice before this period expired. In the *Ooms* case, the applicant was sent to an assistance home and released after spending a full year there.

The main questions which the Court had to decide on the merits of the three cases concerned Article 5.² To begin with, the applicants alleged a violation of Article 5 (1). This provides in part:

Everyone has the right to liberty and security of person. No one shall be deprived of

* © D. J. Harris, 1974.

¹ European Court of Human Rights (cited in these notes as *E.C.H.R.*), Judgment of 18 June 1971. French text authentic. The case was heard by the plenary Court in accordance with Rule 48, Rules of Court.

² Other questions concerned Articles 3, 4, 6, 7, 8 and 13. The Court found it unnecessary to rule on, or found no violation of, these provisions. In addition to the two questions concerning Article 5 discussed below, the Court also considered an allegation based upon Article 5 (3) and found no violation of that provision.

his liberty save in the following cases and in accordance with a procedure prescribed by law: . . .

(e) the lawful detention . . . of vagrants; . . .

The Court held unanimously that the three cases fell within Article 5 (1) (e) so that the applicants' detention was justified under the Convention. The Court first established that the detention the lawfulness of which was in issue in each case was that ordered by the magistrate. Although each applicant had been first arrested by the police, it was not this preliminary police detention that was being challenged. In the absence of a definition of the term 'vagrant' in the Convention, the Court looked to the definition in Belgian law which read: 'vagrants are persons who have no fixed abode, no means of subsistence and no regular trade or profession'. This definition the Court thought to be in no way 'irreconcilable with the usual meaning of the term "vagrant"' and concluded that persons who fall within its terms can 'in principle' be said to fall within Article 5 (1) (e).¹ The Court did not state or imply that the concepts of 'vagrancy' in Belgian law and in the Convention were co-terminous; it left open the possibility that the latter is wider. Applying the test used in Belgian law to the facts of the three cases, the Court concluded that they fell within it. Since, in addition, the applicants' detention had occurred 'in accordance with a procedure prescribed by (Belgian) law', it was consistent with Article 5.

The Court then considered whether Belgium had complied with the separate requirements of Article 5 (4), which reads:

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

The applicants alleged that Article 5 (4) had been violated both when the detention orders were made and subsequently when their petitions for release were rejected by the Belgian Minister of Justice. As to the latter situation, the Court had no difficulty in holding, by fifteen votes to one, that no violation had occurred. Article 5 (4) concerned only 'the lawfulness of the placing in detention or of its continuance'.² In this case, therefore, Article 5 (4) applied only to the magistrate's decision, which was the basis for the applicants' continued detention; it had no application to any discretionary decision that the Minister of Justice might take to terminate that detention prematurely. As to the former situation, the Court first confirmed that the detention the lawfulness of which was in issue in each of the three cases was that ordered by the magistrate and not that by the police. The Court then noted that, on its face, Article 5 (4) seems to envisage the arrest or detention of a person followed by separate court proceedings in which the legality of the arrest or detention is determined. If the Court had adopted this 'two stage' interpretation, Belgium would have violated Article 5 (4) since, as the Court held, there was no possibility in the Belgian legal system of any of the applicants challenging the magistrate's decision before a court.³ The Court, however, did not adopt it, or at least not entirely. It agreed that: '(W)here the decision depriving a person

¹ Judgment, p. 37.

² Ibid., p. 44.

³ Since the detention in issue was not that effected by the police, proceedings before the magistrate could not be said to be proceedings satisfying Article 5 (4) on a 'two stage' interpretation. Even if it were, it is difficult to see, as Judge Zekia pointed out, Judgment p. 62, how the magistrate's proceedings could satisfy Article 5 (4) since they are not directed at determining the legality of the police action, but at deciding whether the provisional police detention should be replaced by detention as a vagrant. For example, a magistrate would not be competent to rule on the legality of the detention by the police of a person beyond the permitted 24-hour period.

of his liberty is one taken by an administrative body, there is no doubt that Article 5 (4) obliges the Contracting States to make available to the person detained a right of recourse to a court. . . .¹ Where, however, 'the decision is made by a court at the close of judicial proceedings', this is not necessary; in such a case, 'the supervision required by Article 5 (4) is incorporated in the decision'. 'It may therefore be concluded', the Court continued, 'that Article 5 (4) is observed if the arrest or detention . . . is ordered by a "court" within the meaning of paragraph 4.'¹

The Court then indicated the meaning of a 'court' for the purposes of Article 5 (4). Firstly, it must be 'independent of the executive and of the parties to the case'.² This the Court had already established in the *Neumeister* case.³ In that case, however, which concerned the detention of an accused person on remand, the Court had held that the term 'court' in Article 5 (4) did not relate also to the procedure followed by the institution in question. In the *Vagrancy* cases, the Court added a second requirement, namely 'that the procedure followed has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question'.⁴ The Court sought to distinguish the *Neumeister* case from the cases before it as follows:

In order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place. Thus, in the *Neumeister* case, the Court considered that the competent courts remained 'courts' in spite of the lack of 'equality of arms' between the prosecution and an individual who requested provisional release (*ibid.*); nevertheless, the same might not be true in a different context and, for example, in another situation which is also governed by Article 5 (4).⁵

It is noticeable, however, that in the *Neumeister* case, the Court, sitting as a chamber of seven judges, had in unequivocal terms denied that considerations of procedure were at all relevant to the concept of a 'court' in Article 5 (4). It would seem that the full Court in the *Vagrancy* cases has modified this earlier view to the extent that although the precise requirements as to procedure may vary with the kind of detention in question, a 'court' must always provide a judicial procedure appropriate to the circumstances. In a somewhat puzzling passage, the Court may have added a third, functional requirement, viz. that a 'court' must be exercising a judicial, as opposed to an administrative, function. The Court noted that a magistrate in Belgium has to decide whether the statutory conditions justifying a person's detention are met and stated that, in doing so, the magistrate 'necessarily decides the "lawfulness" of the detention which the prosecuting authority requests it to sanction'.⁶ Later, however, in the passage quoted in the next paragraph, the court referred to 'the administrative nature of the decision to be given' by the magistrate.

On the facts of the *Vagrancy* cases, the Court had no doubt that the magistrates ordering the detention of the applicants were independent. As to procedure, the Court stated that the deprivation of liberty in the three cases 'resembled that imposed by a criminal court'; in consequence, 'the procedures applicable should not have provided guarantees markedly inferior to those existing in criminal matters in the member States of the Council of Europe'.⁷ Acting on this basis, the Court found the procedure followed by the magistrates under Belgian law inadequate, with the result that Belgium,

¹ *Ibid.*, p. 40.

² *Ibid.*, p. 41.

³ *E.C.H.R.*, Judgment of 27 June 1968, p. 44.

⁴ *E.C.H.R.*, Judgment of 18 June 1971, p. 41.

⁵ *Ibid.*, p. 42.

⁶ *Ibid.*, p. 41. The Court did not attempt any further definition of a judicial function.

⁷ Surprisingly, the Court did not refer to the procedural guarantees in criminal cases in Article 6 of the Convention.

since it provided no remedy before any other body that could be said to be a 'court' in the sense of Article 5 (4) by which the legality of decisions of the magistrates could be reviewed, was in violation of Article 5 (4). The Court commented upon the procedure followed by the Belgian magistrates as follows:

Regarding the interrogation of this individual, the 1891 Act limits itself to specifying in Section 12 that the magistrate ascertains the identity, age, physical and mental state and manner of life of the person brought before him. Regarding the right of defence, the only relevant provision is found in Section 3 of the Act of 1st May 1849, which provides that the person concerned is granted a three-day adjournment if he so requests. According to information provided by the Government, the Code of Criminal Procedure does not apply to the detention of vagrants.

The procedure in question is affected by the administrative nature of the decision to be given. It does not ensure guarantees comparable to those which exist as regards detention in criminal cases, notwithstanding the fact that the detention of vagrants is very similar in many respects. It is hard to understand why persons arrested for simple vagrancy have to be content with such a summary procedure: individuals liable to sentences shorter than the terms provided for [by the vagrancy laws] . . . have the benefit of the extensive guarantees provided under the Code of Criminal Procedure. This procedure undoubtedly presents certain judicial features, such as the hearing taking place and the decision being given in public, but they are not sufficient to give the magistrate the character of a 'court' within the meaning of Article 5 (4) when due account is taken of the seriousness of what is at stake, namely a long deprivation of liberty attended by various shameful consequences.¹

The Court's ruling on this question was by 9 votes to 7.² This, however, is somewhat misleading. Its distinction between arrest or detention by an administrative body and by 'a court at the close of judicial proceedings' was adopted by 14 of the 16 judges.³ All seven of the judges who dissented from the Court's ruling agreed with the reasoning underlying it but disagreed with the conclusion that the procedure followed by the magistrates was inadequate. Two of the dissenting judges—Balladore Pallieri and Verdross—in a joint separate opinion, thought that the Court's comparison between criminal and vagrancy cases was inaccurate at least in so far as it concerned the three cases being considered. Both the nature of the decision to be taken and the possible outcome of the vagrancy proceedings in question suggested to them that the relatively simple hearing given to the applicants met the requirements of Article 5 (4). The remaining five dissenting judges—Holmbäck, Rodenbourg, Ross, Favre and Bilge—took the view, in another joint separate opinion, that the Court, in accordance with the requirement that an individual applicant should show himself to be a 'victim' of a violation of the Convention (Article 25), should have looked more to the procedure actually followed in the three cases than it did and should have relied less upon an analysis of the relevant Belgian law *in abstracto*. Taking this approach, the five judges found that on the facts of the three cases it could not be said that any of the applicants was a 'victim' of a violation of Article 5 (4).

Although it may be difficult in some cases to apply the Court's distinction between what might be called judicial and administrative arrest or detention, and although it gains no support from the text of Article 5 (4), which certainly seems to apply equally

¹ *E.C.H.R.*, Judgment of 18 June 1971, pp. 42–3.

² The judges in the majority were Sir Humphrey Waldock, President; judges Cassin, Maridakis, Wold, Mosler, Zekia, Cremona, Wiarda and Sigurjónsson. The following judges dissented: Holmbäck, Verdross, Rodenbourg, Ross, Balladore Pallieri, Favre and Bilge.

³ The two judges who did not adopt it were Wold and Zekia. They both agreed with the Court's decision on other grounds.

to all kinds of arrest and detention permitted by Article 5 (1), the distinction is very welcome. It would, for example, be surprising if the signatory States had intended that criminal convictions by a court resulting in imprisonment (Article 5 (1) (a)) should be subject to review in the sense of Article 5 (4)—yet this would be the position if the 'two stage' interpretation were to be applied to the cases of judicial, as well as administrative, arrest or detention permitted by Article 5 (1).

Before considering the merits of the cases before it, the Court had had to rule upon an objection as to admissibility. Belgium submitted that all three cases were inadmissible because Article 26 had not been complied with. In particular, it claimed that local remedies had not been exhausted in any of the three cases and that the six months rule had not been observed in one of them (the *Versyp* case). Article 26 applies at the admissibility stage and is expressly addressed to the Commission ('The Commission may only deal with the matter if . . .'), not the Court. It was not altogether surprising, therefore, that the Commission opposed Belgium's submission on the ground that the Court had no jurisdiction to consider these questions; that they were within the exclusive province of the Commission, to be finally determined by it when ruling on the question of admissibility of applications. The Court, by 12 votes to 4,¹ rejected the Commission's argument. In doing so, it argued from the text of Article 45 establishing the Court's jurisdiction *ratione materiae*:

This Article specifies that the 'jurisdiction of the Court shall extend to all cases ('toutes les affaires') concerning the interpretation and application of the . . . Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48. Under this provision, as the Court pointed out in its judgment of 9 February 1967 (*Belgian 'Linguistics' case*, Series A, p. 18), 'the basis of the jurisdiction *ratione materiae* of the Court is established once the case raises a question of the interpretation or application of the Convention'.

The phrase 'cases concerning the interpretation and application of the . . . Convention', which is found in Article 45, is remarkable for its width. The very general meaning which has to be attributed to it is confirmed by the English text of Paragraph (1) of Article 46 which is drafted in even wider terms ('all matters') than Article 45 ('all cases').

True, it follows from Article 45 that the Court may exercise its jurisdiction only in regard to cases which have been duly brought before it and its supervision must necessarily be directed first to the observance of the conditions laid down in Articles 47 and 48. Once a case is duly referred to it, however, the Court is endowed with full jurisdiction and may thus take cognisance of all questions of fact and of law which may arise in the course of the consideration of the case.²

Accordingly, the Court ruled that it had jurisdiction to consider the Belgian Government's submission. Its jurisdiction was particularly clear, the Court thought, in respect of the claim that local remedies had not been exhausted. This was so because:

. . . the rule on the exhaustion of domestic remedies delimits the area within which the Contracting States have agreed to answer for wrongs alleged against them before the organs of the Convention, and the Court has to ensure the observance of the provisions relating thereto just as of the individual rights and freedoms guaranteed by the Convention and its Protocols.³

On the role of the Commission in the light of the Court's ruling, the Court stated:

This conclusion is in no way invalidated by the powers conferred on the Commission under Article 27 of the Convention as regards the admissibility of applications. The task

¹ Judges Ross, Wold, Bilge and Sigurjónsson dissented.

² *Ibid.*, p. 29.

³ *Ibid.*

which this Article assigns to the Commission is one of sifting; the Commission either does or does not accept the applications. Its decisions to reject applications which it considers to be inadmissible are without appeal as are, moreover, also those by which applications are accepted; they are taken in complete independence (see *mutatis mutandis*, the *Lawless* judgment of 14 November 1960, Series A, p. 11). The decision to accept an application has the effect of leading the Commission to perform the functions laid down in Articles 28 to 31 of the Convention and of opening up the possibility that the case may be brought before the Court; but it is not binding on the Court any more than the Court is bound by the opinion expressed by the Commission in its final report 'as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention' (Article 31).¹

The four dissenting judges were unable to accept this analysis of the text of the Convention. In their view, the word 'cases' in Article 45 referred to cases arising out of the findings of law and fact in the Commission's reports; the Court, therefore, was competent in a particular case to rule only on the questions in issue in the Commission's report, which would relate only to the merits of the application. This interpretation, the dissenting judges thought, was also consistent with the clear division of functions which the Convention established between the Commission and the Court, by which the former acts at the admissibility, fact-finding and conciliation stages and the latter rules authoritatively on the question of a breach of the Convention in any case that reaches it. The dissenting judges were also critical of the arbitrary difference which the Court's ruling introduced between the fate of admitted and rejected applications. Whereas decisions taken by the Commission at the admissibility stage of the former can, as in the *Vagrancy* cases, be reconsidered by the Court, decisions taken by it at the same stage in respect of the latter cannot. Judge Bilge suggested that this was particularly inappropriate for a human rights guarantee since the decisions that can be reconsidered are those *against* the respondent State; those in its favour will have led to the rejection of the application. The same judge also pointed out a second unfortunate consequence of the Court's ruling. If the Court does reverse a decision by the Commission—for example, on the question whether an application is substantially the same as one previously submitted (Article 27 (1) (b))—this will in fact be only done several years after the application has been admitted,² and after the prescribed fact-finding and conciliation procedures have been completed, with a consequential waste of time, money and endeavour.

The Court's ruling on its jurisdiction to hear the Belgian submission is clearly important in clarifying the relative competences of the Commission and the Court. Although, as the Court states, the Commission's decisions as to admissibility are not subject to appeal, it is clear, on any interpretation of the Convention, that the Court may, indirectly, reconsider certain decisions of the Commission at the admissibility stage relating to the merits of the case.³ Thus a decision by the Commission rejecting an argument that an application is incompatible with the provisions of the Convention because it does not concern a right guaranteed by the Convention may indirectly be reconsidered by the Court when it decides on the merits of the case.⁴ Similarly,

¹ *E.C.H.R.*, Judgment of 18 June 1971, p. 30.

² Note for example that the period between the decision as to admissibility and the Court's decision on merits in the *Vagrancy* cases was four years and two months.

³ For discussion of the position in respect of applications that are partially admitted and partially rejected, see Sorensen, 'La Recevabilité de l'instance devant la cour européenne des droits de l'homme', *René Cassin: Amicorum Discipulorumque* (1969), vol. 1, p. 333.

⁴ In this connection note that the Court is competent to act *ex officio*: *Neumeister* case, *E.C.H.R.* Judgment of 27 June 1968, p. 41.

a decision by the Commission at the admissibility stage that an application is not manifestly ill-founded is, in effect, ruled upon by the Court when it decides whether the case presents a violation of the Convention on its facts. What the *Vagrancy* cases establish is that the Court's competence to reconsider questions decided by the Commission at the admissibility stage is much wider than this; that it covers 'all questions of fact and law' decided at that stage (as well as later), whether related to the merits of the case or not. In the *Vagrancy* cases this meant that the Court could go over again, and decide finally, the question of the application of the local remedies and six months rules. In another case, it could, for example, mean that the Court could decide to hear a defendant State's submission (provided it had earlier been made before the Commission¹) that some other requirement as to admissibility listed in Article 27 had not been complied with or consider (with the same proviso) whether an individual applicant was a 'victim' for the purposes of Article 25.

The Court's ruling thus constitutes a setback to the conception of the Convention which sees the Commission and the Court as separate and equal institutions, each sovereign within its own sphere. The Court has asserted its primacy on questions of interpretation and application of the law of the Convention. The reading of the Convention by the Court supporting its view is plausible, though not inevitable; one could as easily agree with the dissenting judges. It makes good sense for there to be a single institution with authority to rule definitively on the meaning of the Convention as a whole and for this to be the primary judicial institution established by the Convention. The Court's ruling goes some way towards achieving this result.² But, as the dissenting judges demonstrate, there are drawbacks to the Court's approach. The problem of delay referred to by Judge Bilge could be met by revising the Convention so that the Court's jurisdiction on questions of admissibility unconnected with the merits of a case could be exercised at an interlocutory stage. There would be the difficulty, however, that the Court would not have the advantage of the Commission's report on the facts of the case. If any such revision also allowed the Court to hear appeals against decisions by the Commission to reject applications, this would overcome the arbitrariness in the different treatment given to admitted and rejected applications by the Court's approach. Here, again, there would be a difficulty, this time in the likelihood that such a revision would, as far as the Court was concerned, reintroduce the 'flood of applications' problem that the admissibility stage was designed to avoid.

Having decided that it could consider Belgium's submission as to admissibility, the Court then examined and rejected it. It did so on grounds of estoppel in so far as the submission related, firstly, to the failure of one of the applicants, Versyp, to make his application within six months and, secondly, to the failure of all three applicants to exhaust local remedies in respect of the decisions of the Minister of Justice refusing to release them. The Court held that 'objections to jurisdiction and admissibility must, in principle, be raised first before the Commission to the extent that their character and the circumstances permit'.³ Since Belgium had not raised either of the matters

¹ See below, this page, n. 3.

² The Commission still has the final word on applications *totally* rejected by it (on applications that are partially rejected only, see Sorensen, loc. cit. (above, p. 468 n. 3)), and some cases that are admitted are decided by the Committee of Ministers or do not reach the final stages of proceedings. Note that it is most unlikely that the Committee of Ministers will claim a jurisdiction on questions of admissibility of the sort that the Court has marked out for itself. The terms of Article 32 do not lend themselves to this interpretation as readily as those of Article 45 and, anyway, the Committee of Ministers is not a comparable judicial forum.

³ *E.C.H.R.*, Judgment of 18 June 1971, p. 30.

indicated above in proceedings before the Commission, it was precluded from doing so now. The Court did not rely upon any particular provision of the Convention to justify its approach on this question; it would seem instead to have applied, in the terms of Article 38 of the Statute of the International Court of Justice, a 'general principle of law': 'It is in fact usual in practice in international and national courts that objections to admissibility should as a general rule be raised *in limine litis*.'¹ In so far as the submission related to the failure of all three applicants to appeal to the Belgian *Conseil d'État*, against the magistrate's decision to detain them, the Court accepted that Belgium had raised this matter before the Commission, although it had done so in earnest only when the Commission was considering the applications on their merits and not at the admissibility stage, and hence was not precluded from pursuing it before the court. The facts raised the question of the nature of an effective remedy for the purposes of the local remedies rule. At the time that the applicants were ordered to be detained, the case-law of the *Conseil d'État* was to the effect that it could not review a decision of a magistrate under the vagrancy laws. There was, however, a case—the *Du Bois* case—then pending before the *Conseil d'État* concerning another vagrant, which raised that very question again and in which, after the *Vagrancy* cases had been admitted for consideration on the merits by the Commission, the *Conseil d'État* reversed its prior case-law and quashed a magistrate's decision to detain a vagrant. It was on the basis of these facts that Belgium argued non-exhaustion of local remedies. The Court, however, agreeing with the Commission, ruled against Belgium:

The Court finds—without it even being necessary to examine here whether recourse to the *Conseil d'État* would have been of such a nature as to satisfy the complaints—that according to the settled legal opinion which existed in Belgium up to 7 June 1967 recourse to the *Conseil d'État* against the orders of a magistrate was thought to be inadmissible.

This was the submission of the Government itself before the *Conseil d'État* in the *Du Bois* case. One cannot reproach the applicants that their conduct in 1965 and 1966 conformed with the view which the Government's Agent continued to express at the beginning of 1967 at the hearings on admissibility before the Commission and which was prevalent in Belgium at the time.

Furthermore, once the *Du Bois* judgment of 7 June 1967 was known, the applicants were not in a position to benefit from the possible remedy it seemed to open up because, well before that judgment was pronounced, the time-limit of sixty days prescribed by Article 4 of the Regent's Decree of 23 August 1948 on the procedure before the administrative division of the *Conseil d'État* had expired.²

Pre-trial detention in criminal proceedings (Article 5 (3))—Trial within a reasonable time (Article 6 (1))—'civil rights' in Article 6 (1)—trial by an 'independent and impartial tribunal' (Article 6 (1))—local remedies (Article 26)

*Case No. 2. Ringeisen case.*³ In this case, which was referred to the Court by the Commission, criminal proceedings were brought in Austria against the applicant, an Austrian national. The Court held that Austria had violated Article 5 (3) of the Convention by its detention of the applicant for a two-year period during these proceedings. It rejected allegations that Austria had also violated Article 6 (1) both in the same proceedings and in separate proceedings before an Austrian public body controlling the use of land.

¹ E.C.H.R., Judgment of 18 June 1971, p. 30

² Ibid., pp. 34–5.

³ E.C.H.R., Judgment of 16 July 1971. French text authentic. The Court was composed as follows: Rolin (President); Holmbäck, Verdross, Wold, Zekia, Favre and Sigurjónsson (judges).

So far as they relate to the allegation made under Article 5 (3) of unlawful pre-trial detention, the facts of the case were that the applicant was detained pending trial on two separate occasions. The first occurred in 1963 when he was detained for about 4½ months on charges of fraud. He was then detained for 2 years from 15 March 1965 to 20 March 1967 on charges of fraudulent bankruptcy. Shortly after the beginning of this second period of detention, on 15 May 1965, an order was made renewing the applicant's detention on the fraud charges initiated in 1963. This order remained operative until 15 March 1967—i.e. for about 1 year and 9 months, during the whole of which time the applicant was in detention on the fraudulent bankruptcy charges. On 14 January 1966, the applicant was convicted on the fraud charges and sentenced to 3 years' imprisonment. He remained in detention during his appeal against this conviction and sentence and during some of the subsequent rehearing of the case and further appeal proceedings following that rehearing. His sentence was ultimately, on 24 April 1968, reduced to 2 years and 9 months, towards which the entire period of detention on remand counted. On 17 September 1968, following the final decision in the fraud case, the charges of fraudulent bankruptcy were withdrawn without the applicant's being brought to trial in respect of them.

Applying Article 5 (3), the Court noted that the first period of detention, if taken alone, could not be examined by it because of the 6 months rule (Article 26). In accordance with the *Neumeister* case,¹ however, that period was to be added to the second period of detention 'for the purpose of assessing the reasonableness of the whole period of detention on remand in the fraud case'.² With regard to the second period of detention, the Court began by considering whether there were good reasons in the public interest justifying the detention of the applicant for all or for any part of it. The Court considered first the reasons given by the Austrian courts for his detention on the fraudulent bankruptcy charges. These were the likelihood of interference with witnesses and the prevention of crime. As to the former, the Court was of the opinion that it did not 'stand up to examination'.³ The applicant had been free for long enough after the proceedings in fraudulent bankruptcy had begun in 1964 and before the decision to detain him in respect of those proceedings was taken in 1965 to allow him to interfere with witnesses if he wished to do so. As regards the latter, the Court thought that the danger of the applicant's committing further acts to defraud his creditors ceased to justify his continued detention 'at least as from'³ the time that he was declared bankrupt on 14 May 1965. Thereafter, 'not only was the administration of his property outside his power but no debt due could be paid validly to him in person . . .'.³ The detention of the applicant from 14 May 1965 until 20 March 1967 in connection with the fraudulent bankruptcy case, i.e. for 1 year and 10 months, was, therefore, contrary to Article 5 (3).⁴ The Court then considered whether that part of the second period of detention which related to the fraud charges was justifiable by reference to those charges. The grounds relied upon by the Austrian court were the danger of escape and the prevention of crime. The Court noted:

No precise information was given, however, as to any circumstances arising after 12 May 1965 which caused such dangers to appear or to reappear.⁵

¹ *E.C.H.R.*, Judgment of 27 June 1968, p. 37.

² *E.C.H.R.*, Judgment of 16 July 1971, pp. 41-2.

³ *Ibid.*, p. 43.

⁴ Having established that there was no justification for the applicant's detention 'at least as from' 14 May 1965, the Court did not pursue further the question whether the applicant's detention during the earlier two months of the second period of detention was justified.

⁵ *E.C.H.R.*, Judgment of 16 July 1971, p. 43.

This, the Court thought, was 'especially pertinent' to the prevention of crime ground; it was 'most unlikely' in the publicity attending the case that the applicant would be able to engage in similar fraudulent conduct, as other circumstances in the case also made clear.¹ In these circumstances, the Court found no justification for the applicant's detention in the fraud case; the true explanation for it was, the Court seemed to be saying, to be found in the fact that the applicant was already in detention on other charges and the Austrian courts thought that it would not make much difference if a warrant were issued in respect of the fraud case too:

The explanation of the decision of 12 May 1965 clearly lies in the fact that, since 15 March 1965, Ringeisen was being held in detention under a warrant of arrest issued by the judge who was investigating the charges of fraudulent bankruptcy; and, indeed, one of the Government's counsel let it be understood that the decision itself was scarcely defensible in Austrian law.²

The Court's ruling that the applicant was unlawfully detained for the whole of the period from 14 May 1965 onwards was made by a bare majority of 4 votes to 3.³ Five members of the Court held that the detention was unlawful from that date until 14 January 1966, i.e. until the applicant was convicted of fraud. One of these five—Judge Verdross—joined the dissenting judges in respect of the remaining period. He did so in reliance on the Court's ruling in the *Wemhoff* case⁴ that once an accused person is convicted by a trial court he ceases to be within Article 5 (1) (c) and (3); his detention is justified by Article 5 (1) (a) instead.⁵ The Court, which was well aware of this earlier ruling, found it unnecessary to consider its application to the case before it. In its opinion, the applicant was, in reality, detained throughout the whole of the second period of detention on the fraudulent bankruptcy charges. The detention on the fraud charges was, as it were, an afterthought; it could 'be explained in fact only by the other detention'.⁶ The conviction for fraud 'did not change this situation'.⁷ In consequence, Article 5 (3) continued to apply. In reaching this conclusion, the Court was not impressed by the fact pointed out by Judge Verdross that when the applicant applied for his release in the fraud case on the day of his conviction, there was a new danger, which was mentioned by the Austrian Appeal Court concerned as the 'main reason'⁸ for refusing the application, that he might abscond.

In commenting on the Court's approach to the question of the period of detention covered by Article 5 (3), the first point to note is that when examining the facts relating to the continued detention of the applicant after his conviction in the fraud case, the Court was, it would seem, looking for the *real* reason for it. In this connection it should be noted that, as Judge Zekia observed,⁹ Article 5 is complied with if a State can justify a person's detention on any one of the grounds indicated in Article 5 (1). Even if it is accepted that this justification must be in terms of reasons given at the time of the detention, it is arguable that a State need only show that the reason then given, whether the *real* reason or not, is one that is permitted by Article 5 and applies on the facts of the case. Thus, in the present case it was—arguably—sufficient to show, as Austria did, that at least formally the continuation of the detention was because of his

¹ *E.C.H.R.*, Judgment of 16 July 1971, p. 43.

² *Ibid.*, p. 44.

³ Judges Holmbäck, Verdross and Zekia dissented.

⁴ *E.C.H.R.*, Judgment of 27 June 1968.

⁵ Judge Zekia adopted much the same view; he disagreed with the majority, however, on the application of Article 5 (3) to the period up to the applicant's conviction. Judge Holmbäck did not elaborate on this question.

⁶ *E.C.H.R.*, Judgment of 16 July 1971, p. 44.

⁷ *Ibid.*, p. 45.

⁸ *Ibid.*, p. 50.

⁹ *Ibid.*, p. 55.

conviction. And, in the words of the Court in the *Wemhoff* case, 'it is immaterial, in this respect, whether detention after conviction took place on the basis of the judgment or . . . by reason of a special decision confirming the order of detention on remand'.¹ The Commission, which had decided, by 7 votes to 5, that the *Wemhoff* case did not apply to the facts of the *Ringeisen* case, had asked the Court to review its earlier ruling or 'at least to interpret it in such way that detention after conviction may be considered as remaining subject to Article 5, paragraph (3), until the conviction becomes firm in cases where the national law of the respondent State maintains up to that time the provisional character of the detention (remand), makes the detention subject to the same conditions and affords to the detained person the same remedies'.² By side-stepping the *Wemhoff* case, the Court did not find it necessary to consider this request.

So far as the Court's approach to Article 5 (3) in other respects is concerned, it is clearly consistent with that developed in the *Wemhoff*, *Neumeister* and other cases according to which Article 5 (3) controls not only the length of proceedings against a person detained pending trial but also the reasons for his detention. Since the prevention of crime justification was not established to the satisfaction of the Court on the facts of the case, there was no need for it to consider the close ruling by another chamber of the Court in the *Matznetter* case³ that prevention of crime is a permissible basis for pre-trial detention where there are reasonable grounds to believe that the applicant, if released, will commit serious offences similar in kind to those with which he is charged.

The Court unanimously rejected an allegation that Austria had violated Article 6 (1) in the criminal proceedings brought against the applicant because they were not completed within a reasonable time.⁴ Proceedings in the fraud case took approximately 5 years and 2 months from the time of the opening of the preliminary investigation to the final decision in the case.⁵ The investigation, during which a continually increasing number of complaints of fraud by different persons were examined, lasted a little over 2 years. The period between the filing of the indictment and the opening of the trial lasted about 7 months, much of which time was attributable to steps taken by the applicant. The trial lasted for one month. Appeal proceedings, coupled with a rehearing and further appeal proceedings took another 2 years and 3 months. In the opinion of the Court, the length of proceedings was justified by the complexity of the case and 'the innumerable requests and appeals made by Ringeisen not merely for his release, but also challenging most of the competent judges and for the transfer of the proceedings to different court areas'.⁶ As to the proceedings in fraudulent bankruptcy, which lasted approximately 4 years, the Court thought that considerations similar to those relevant in the fraud case applied and that it was reasonable for the authorities to wait until the outcome of the fraud case was known before deciding whether to continue with the other charges as well.

¹ Loc. cit. above (p. 472 n. 4), p. 24.

² E.C.H.R., Judgment of 16 July 1971, p. 44. In accordance with the Commission's proposed limited reading of the *Wemhoff* ruling, detention pending appeal would, for example, be within Article 5 (3) in Austria but not in England. ³ E.C.H.R., Judgment of 10 November 1969.

⁴ The Commission had taken the same view in respect both of the fraud case (unanimously) and of the fraudulent bankruptcy case (by 11 votes to 1).

⁵ The Court took as the starting-point of the period relevant for the purposes of Article 6 (1) the date of the opening of the investigation and not the (earlier) date of the laying of the first charges. In the *Wemhoff* case, the Court had taken as the starting-point, 'the date on which the first charges were levelled against Wemhoff and his arrest was ordered', loc. cit. (above, p. 472, n. 4), at p. 26. See also the *Soltikow* case, below, p. 485.

⁶ E.C.H.R., Judgment of 16 July 1971, p. 45.

It is interesting to note that Judge Zekia agreed with the Court's holding in this case. Judge Zekia had earlier dissented in the *Neumeister* case from a holding that, on the facts of the case, the expiration of over 7 years between the time that charges were laid and trial court proceedings completed was consistent with Article 6. As the only judge trained in a common law system on the Court in either case, he was likely to have a particularly critical approach to the time that can elapse in civil law systems during which a person may remain subject to a criminal charge.

The second allegation of a breach of Article 6 (1) concerned the functioning of the Regional Property Transactions Commission in the province of Upper Austria. By statute, the transfer of ownership of agricultural land requires the approval of a local District Commission, with an appeal to the Regional Commission. The Regional Commission is a mixed body. It is presided over by a judge and consists largely of representatives of interested groups, including agriculture, commerce, housing estate residents and townspeople. In the applicant's case, the competent District Commission, applying statutory criteria, refused him permission to purchase certain land because it was thought that he would 'withdraw the land from agricultural use on a large scale without adequate reason and that he intended to make a speculative capital investment'.¹ The Regional Commission rejected the applicant's appeal. The applicant alleged bias on the part of the Regional Commission.

The first question which the Court had to decide was whether Article 6 (1) applied: in particular, did the proceedings before the Regional Commission involve the determination of a civil right or obligation of the applicant? The Court held that they did, so that Article 6 (1) applied:

For Article 6, paragraph (1), to be applicable to a case ('contestation') it is *not* necessary that both parties to the proceedings should be private persons, which is the view of the majority of the Commission and of the Government. The wording of Article 6, paragraph (1), is far wider; the French expression 'contestations sur (des) droits et obligations de caractère civil' covers all proceedings the result of which is decisive for private rights and obligations. The English text, 'determination of . . . civil rights and obligations', confirms this interpretation.

The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are therefore of little consequence.

In the present case, when Ringeisen purchased property from the Roth couple, he had a right to have the contract for sale which they had made with him approved if he fulfilled, as he claimed to do, the conditions laid down in the Act. Although it was applying rules of administrative law, the Regional Commission's decision was to be decisive for the relations in civil law ('de caractère civil') between Ringeisen and the Roth couple.²

It is clear from this passage that the Court has accepted the view of the Commission that the term 'civil rights' in Article 6 refers to the distinction between private and public law found in civil law systems (but absent from common law ones) and that Article 6, accordingly, applies only to the determination of private law rights and obligations and not to the determination of public law ones. The Court has, however, extended the scope of Article 6 as understood by the Commission in one important respect. It has established that a civil right or obligation is being *determined* not only when it is directly in issue between the parties to a case but also when an adjudication

¹ *E.C.H.R.*, Judgment of 16 July 1971, p. 10.

² *Ibid.*, p. 39. The Commission had decided, by 7 votes to 5, that Article 6 did not apply.

on a separate public law question is indirectly decisive for it. To repeat the key part of the Court's judgment, '... Article 6, paragraph (1) ... covers all proceedings the result of which is *decisive* for private rights and obligations'. It was for this reason that proceedings before the Regional Commission were within Article 6.

This is potentially a substantial inroad upon the exclusion of public rights and obligations from Article 6. In English law, for example, decisions about compulsory purchase, slum clearance, agricultural tenancies and rents in furnished houses come to mind at once in the area of public control of the use of land as decisions that can be as decisive for private property rights as was the decision in the *Ringeisen* case. In one sense, an extension of the scope of Article 6 is very welcome. In the United Kingdom, at least, it is mostly in respect of the functioning of administrative tribunals and authorities¹ that the need for a fair trial guarantee is at present most evident. On the other hand, it is arguable that the better approach would be to draft a new text in a protocol tailored to the specific needs of administrative law rather than to apply a text which will not always easily fit accepted procedures for decision-making by administrative authorities and tribunals. One further point of interest is that the Court did not comment upon the approach established in the Commission's jurisprudence by which 'civil rights and obligations' is viewed as an autonomous concept that does not refer back to the law of the State concerned; it would be surprising, however, if a doctrine of *renvoi* were to apply instead; it would lead to a lack of common European standard where one is desirable. In English law, the public law—private law distinction does not exist. There are, however, differences of classification on such questions from one civil law system to another. It is for the Strasbourg authorities to adopt the classification appropriate for the Convention.

Having established that Article 6 (1) applied, the Court held unanimously that there had been no violation of it in the proceedings in question. The applicant alleged bias, so that the 'tribunal' could not be said to be 'impartial'. He made a number of specific allegations. In respect of his complaint that one of the members of the Regional Commission sat as the nominee of the Upper Austrian Chamber of Commerce, the Court pointed out that the Regional Commission was a body composed, under the presidency of a judge, of representatives of all interested groups. As to the fact that the President of the Regional Commission had represented the Commission and that one of its other members had been a witness in proceedings before the Constitutional Court in which the applicant had successfully been granted a rehearing of his case by the Commission, the Court stated that 'this is obviously irrelevant'.² Nor, the Court ruled, was it a ground of 'legitimate suspicion'² that two other members of the Regional Commission who had participated in the first hearing of the case by the Commission participated in the second

... for it cannot be stated as a general rule resulting from the obligation to be impartial that a superior court which sets aside an administrative or judicial decision is bound to send the case back to a different jurisdictional authority or to a differently composed branch of that authority.²

As well as considering the question of bias, the Court observed that the Regional Commission was a 'tribunal' within the meaning of Article 6 (1). This was so because

¹ It remains to be seen whether the Court would apply Article 6 to discretionary decisions by ministries or local authorities or to decisions by such bodies which involve the application of statutory criteria. The Commission, in one line of cases, has not done so: see, for example, A.1329/62, *Yearbook of the E.C. on Human Rights*, 5 (1962), p. 200.

² *E.C.H.R.*, Judgment of 16 July 1971, p. 40.

'it is independent of the executive and also of the parties, its members are appointed for a term of five years and the proceedings before it afford the necessary guarantees'.¹ Strictly, the first two of these factors, and probably the third, go to the requirement that a 'tribunal' be 'independent' rather than to the definition of a 'tribunal'.² As to the 'necessary guarantees' in respect of procedure, the Court did not go into details. One important fact about the Regional Commission's proceedings was that they are, by statute, in private. The Court noted this fact but did not consider whether it was consistent with the normal rule of a 'public hearing' in Article 6 (1) because of an Austrian reservation to the Convention which, the Court ruled, covered the Regional Commission's proceedings.

As in the *Vagrancy* cases, the Court was first faced with a submission as to admissibility by the respondent Government. In particular, it was argued that the local remedies rule had not been complied with in respect of the applicant's allegation about proceedings before the Regional Property Transactions Commission. The Court reaffirmed its ruling in the *Vagrancy* cases on its jurisdiction to consider such a submission. It then held, by 6 votes to 1,³ that the submission was not well founded. Austria argued that local remedies had not been exhausted in accordance with the Convention because an appeal by the applicant to the Austrian Constitutional Court against the ruling of the Regional Commission had not been decided when the applicant lodged his application.⁴ The appeal was lodged with the Constitutional Court in April 1965. Judgment was delivered (against the applicant) on 27 September of the same year. The application to the Commission had been lodged in July and registered on 24 September. The Commission gave a partial decision on admissibility in June 1967 and a final decision in July 1968. The Austrian submission turned upon the meaning of that part of Article 26 which states that the Commission may only 'deal with' an application if local remedies have been exhausted. According to the respondent Government, the Commission begins to 'deal with' an application as soon as it is lodged. According to the Commission, which opposed the submission, Article 26 'did not prevent the lodging of the application, but solely its examination by the Commission'⁵ on its merits. The Court expressed its view as follows:

The Court does not consider that it can adopt either of these extreme positions.

On the one hand, it would certainly be going too far and contrary to the spirit of the rule of exhaustion of domestic remedies to allow that a person may properly lodge an application with the Commission before exercising any domestic remedies.

On the other hand, international courts have on various occasions held that international law cannot be applied with the same regard for matters of form as is sometimes necessary in the application of national law. Article 26 of the Convention refers expressly to the generally recognised rules of international law. The Commission was therefore quite right in declaring in various circumstances that there was a need for a certain flexibility in the application of the rule. . . .

Thus, while it is fully upheld that the applicant is, as a rule, in duty bound to exercise the different domestic remedies before he applies to the Commission, it must be left open to the Commission to accept the fact that the last stage of such remedies may be reached shortly after the lodging of the application but before the Commission is called upon to pronounce itself on admissibility.

¹ *E.C.H.R.*, Judgment of 16 July 1971, p. 39.

² Note, however, the Court's interpretation of 'court' in Article 5 (4); see the *Vagrancy* cases, above, p. 465. Note that the Court applied Article 6 to the Regional Commission, an *appellate* body.

³ Judge Verdross dissented.

⁴ Note that, as required by the *Vagrancy* cases, Austria had argued this point earlier before the Commission.

⁵ *E.C.H.R.*, Judgment of 16 July 1971, p. 36.

The Court further notes that individual applications often come from laymen who, in more than nine cases out of ten, address themselves to the Commission without legal assistance. A formalistic interpretation of Article 26 would therefore lead to unfair consequences.¹

After stating the facts before it, the Court continued:

Reference to these facts suffices to show that no legitimate interest of the respondent State could have been prejudiced in the present case through the fact that the application was lodged and registered a short while before the final decision of the Constitutional Court.²

The text of the Convention is ambiguous on the meaning of Article 26. To mention just two of the textual arguments put to the Court, on the one hand, the French text of Article 26 ('La Commission ne peut être saisie') clearly supports the view that it is when an application is lodged that is crucial. On the other hand, the wording 'deal with' also appears in Article 27 (1), where it equally clearly means 'deal with' on the merits. The interpretation adopted by the Court is consistent with the approach it took in a similar situation in the *Wemhoff* case. In that case the Court said:

Thus confronted with two versions of a treaty which are equally authentic but not exactly the same the Court must, following established international law precedents, interpret them in a way that will reconcile them as far as possible. Given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.³

It is also consistent with the flexible approach that it has taken on the question of the participation of an individual applicant in the Court's proceedings. One further merit of the Court's ruling is that it helps to shorten the lengthy time taken for an application to be considered since a potential applicant can go ahead and apply, and the Commission take the initial steps in considering the application, before the final decision at the local level has been pronounced. This is so, however, only to a modest extent. It seems likely that it is important to stress the particular facts of the *Ringeisen* case.⁴ All local remedies had been taken up by the applicant and the final decision was given just 3 months after the application was lodged. A related question is how, when the question arises, the Court will interpret the wording 'deal with' in Article 26 so far as it relates to the 6 months rule. Although one would normally assume that it had the same meaning for both of the rules in Article 26, it would be surprising if the Commission was, in effect, required to begin considering an application on its merits within 6 months of the final decision in the case at the local level. Such an interpretation would indeed expedite the consideration of applications.

Application of Article 50—no need to exhaust local remedies—cases in which the Court can act under Article 50—'decision or measure taken'—'injured party'—the existence of damage

*Case No. 3. De Wilde, Ooms and Versyp cases (The Vagrancy cases) (Question of the application of Article 50 of the Convention).*⁵ In this judgment the Court applied

¹ Ibid., pp. 37-8.

² Ibid., p. 38.

³ Loc. cit. (above, p. 472 n. 4).

⁴ Note that the Court described the Commission's view as 'extreme'.

⁵ *E.C.H.R.*, Judgment of 10 March 1972. French text authentic. The Court consisted of the same full Court that had heard earlier proceedings in the three cases (see above, p. 466 n. 2), except that Judge Bilge was unable to participate.

Article 50 of the Convention¹ for the first time. It decided that 'just compensation' should not be awarded.

In its earlier judgment 18 June 1971² in these cases, the Court reserved 'for the applicants the right, should the occasion arise, to apply for just satisfaction'. It had made similar statements in other earlier cases,³ but the present cases proved to be the first in which the applicants took advantage of this opportunity. Following the Court's judgment of 18 June 1971, the applicants' lawyer wrote the same month to the Belgian Minister of Justice on behalf of two of the applicants⁴ seeking damages. The Minister replied on 12 July, refusing the applicants' claims. Thereupon, on 27 July, the applicants' lawyer wrote to the Commission asking it to request the Court to award the applicants damages. In particular, 300 Belgian francs (about £3) per day of 'unlawful detention' were claimed. The Commission referred the letter to the Court, whose President decided that the claims should be heard by the judges who had taken part in the judgment of 18 June 1971. The Court requested, and received, written observations on the question of the application of Article 50 from Belgium and from the Commission. A memorandum from the applicants' lawyer was appended to the Commission's observations. Oral proceedings were conducted in which Belgium and the Commission participated.

The Court rejected unanimously an objection to admissibility presented by Belgium on the ground of non-exhaustion of local remedies. It ruled that, contrary to Belgium's submission, Article 26 did not apply to the claims which were part of a case in which Article 26 had been properly applied at an earlier stage. It ruled also that Belgium was mistaken in its submission that because the applicants had not exhausted local remedies in seeking reparation after the Court's decision in their favour they had not shown, as a matter of the admissibility of a claim under Article 50, that Belgian law 'allows only partial reparation to be made for the consequences' of the violation. This was so for three reasons: if it had been intended to make applications for 'just satisfaction' under Article 50 subject to the exhaustion of local remedies, this would have been expressly stated, as it was elsewhere in the Convention where this was the intention; the origin of Article 50, in similar provisions in treaties for the pacific settlement of disputes, showed that the part of its wording relied upon by Belgium had nothing to do with the local remedies rule; and, finally, an obligation to exhaust local remedies for a second time would so lengthen proceedings at Strasbourg as to 'lead to a situation incompatible with the aim and object of the Convention'⁵ as a human rights guarantee. In the Court's opinion, the wording of Article 50 relied upon by Belgium stated a rule going to the merits of any application for 'just satisfaction' and not to the question of admissibility.

The Court then considered the applicants' claims for compensation on their merits. In this context, too, Belgium raised the question of local remedies, arguing again, this

¹ Article 50 reads:

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

² See above, p. 463.

³ See the *dispositifs* in the *Belgian Linguistics* case, *E.C.H.R.*, Judgment of 23 July 1968, the *Neumeister* case, *ibid.*, Judgment of 27 June 1968 and the *Stögmüller* case, *ibid.*, Judgment of 10 November 1969.

⁴ A similar letter on behalf of the third applicant was sent in August, also without success.

⁵ *E.C.H.R.*, Judgment of 10 March 1972, p. 5.

time as a matter going to the merits of the claims, that since local remedies had not been exhausted, it had not been shown (as had to be shown for Article 50 to apply), that Belgian law 'allows only partial reparation to be made for the consequences' of the violation. The Court rejected this argument. In doing so, it distinguished between two kinds of cases: those in which, in the nature of things, *restitutio in integrum* is impossible and those in which this is not so. In the first kind of case, of which the cases before the Court were examples, it was clear that the internal law of the respondent State could never make full reparation:

Neither the Belgian internal law, nor indeed any other conceivable system of law, can make it possible to wipe out the consequences of the fact that the three applicants did not have available to them the right, guaranteed by Article 5 (4), to take proceedings before a court in order to have the lawfulness of their detention decided.¹

For this reason there was no need for the applicants to do more than they had done, namely to request compensation from the Belgian Government outside of the framework of the local remedies rule. But this reasoning supposed that Article 50 applied to cases where *restitutio in integrum* was impossible in the nature of things. It was arguable that it did not; that Article 50 applied only to one special situation, viz. that in which *restitutio in integrum*, although otherwise possible, was rendered impossible not in the nature of things but by the respondent State's internal law. This kind of situation had in fact been the *raison d'être* of the treaty provisions upon which the text of Article 50 had been modelled. The Court rejected this narrow view of its power under Article 50:

No doubt, the treaties from which the text of Article 50 was borrowed had more particularly in view cases where the nature of the injury would make it possible to wipe out entirely the consequences of a violation but where the internal law of the State involved precludes this being done. Nevertheless, the provisions of Article 50 which recognise the Court's competence to grant to the injured party a just satisfaction also cover the case where the impossibility of *restitutio in integrum* follows from the very nature of the injury; indeed, common sense suggests that this must be so *a fortiori*. The Court sees no reason why, in the latter case just as in the former, it should not have the right to award to the injured persons the just satisfaction that they had not obtained from the Government of the respondent State.²

Three members of the Court—Judges Holmbäck, Ross and Wold—in a joint separate opinion, disagreed with the Court's reasoning. In their view, Article 50 gave the Court only the limited competence that the treaty provisions upon which it was modelled were intended to give, namely (as indicated above) competence to act in any case, whether *restitutio in integrum* was possible or not, in which 'a State, although willing enough to fulfil its international obligations, for constitutional reasons is unable to do so without changing its constitution'.³ The Court's application of Article 50 to cases in which *restitutio in integrum* was impossible in the nature of things was 'unsound':

It presupposes that there is an absolute obligation on the State to restore to the applicants the liberty of which they have been deprived. But this cannot be so because of the maxim *impossibilium nulla est obligatio*.⁴

The three judges then referred to Articles 5 (5), 53 and 54 (the last of which provides that the Committee of Ministers shall supervise the execution of the Court's judgments) and continued:

The general idea behind these various provisions obviously is that the Convention relies on the Contracting Parties to fulfil their obligations according to the Convention

¹ Ibid., p. 7.

² Ibid., p. 6.

³ Ibid., p. 10.

⁴ Ibid., p. 11.

voluntarily by means of decisions and measures taken within their domestic jurisdiction. Relying on this willingness of the Contracting Parties to comply in good faith with their obligations, the general rule is that a party claiming to be injured must seek redress before the national courts and not before the European Court of Human Rights. There is one exception: if the national law of the State prevents it from making full reparation Article 50 confers on this Court the power to afford just satisfaction to the injured party.¹

In the cases before the Court, the three judges considered that the appropriate reparation consisted in the payment of compensation for damages, if any, suffered as a result of the violation. The question was, therefore, whether Belgian law allowed the applicants full compensation for such damages. It was for the applicants to show that it did not for the Court to be competent to act under Article 50, and this, the three judges considered, they had not done. Judge Verdross, in a separate opinion, also expressed reservations about the Court's approach in so far as it means that an applicant does not have to resort to local remedies first in search of reparation before coming back to the Court. In his opinion, 'it is in accordance with the spirit and general system of the Convention for the Court first to allow the respondent State the option of granting the injured party adequate compensation under its own procedure'.²

A second argument put by Belgium was that the failure to provide appeal proceedings against the decisions to detain the applicants was not 'a decision or a measure taken' by it for the purposes of Article 50. Belgium thus distinguished between acts and omissions, arguing that Article 50 applied only to the former. The Court unanimously rejected this distinction; any violation of the Convention properly complained of by an application under Article 25 gave rise to the operation of Article 50.

Belgium also argued that there was 'no injured party'. The Court rejected this argument too, again unanimously:

In the context of Article 50 these two words must be considered as synonymous with the term 'victim' as used in Article 25; they denote the person directly affected by the act or omission which is in issue. De Wilde, Ooms and Versyp, whom the Commission rightly found to be victims in declaring their petitions admissible, are thus also 'injured parties'.³

But on the final question of the existence of damage calling for 'just satisfaction', the Court, by 14 votes to 1, decided in favour of Belgium and so rejected the applicants' claims. It did so, first, because the claims were expressed in terms of compensation per day of 'unlawful detention'. They could only be allowed on this basis if the detention itself had been unlawful, which it had not. Secondly, as far as damage in respect of the absence of appeal proceedings against the decisions to detain the applicants was concerned, the Court noted:

Moreover, the applicants had the benefit of free legal aid before the Commission, and later with the Commission's delegates, and they have not made any point concerning costs which they may have incurred without reimbursement.

Finally, the Court does not find that in the present cases any *moral damage* could have been caused by the lack of a remedy which met the requirements of Article 5 (4).⁴

The sole dissenting judge on this final and decisive question was Judge Zekia. In his opinion, the applicants had suffered damage in the form of the cost, inconvenience and delay involved in having to resort to Strasbourg to challenge the legality of their detention when, under the Convention, the respondent State should itself have provided a remedy for them. Assuming that they had acted in good faith and reasonably in

¹ *E.C.H.R.*, Judgment of 10 March 1972, pp. 11-12.

³ *Ibid.*, p. 7.

² *Ibid.*, p. 13.

⁴ *Ibid.*, p. 8.

appealing to Strasbourg, as they clearly had, Judge Zekia thought that they were entitled to any expenses they had incurred in doing so. Details of any such expenses could have been obtained by the Court from its Registry.

The Court went a long way in this judgment towards clarifying the meaning of Article 50. First, in terms of the procedure to be followed in the consideration of a claim made under Article 50, the Court established that such a claim is a continuation of a case of which the Court is already siesed. The claim is therefore heard solely by the Court; there are no further proceedings before the Commission.

Secondly, the Court gave some indication of the kinds of cases in which it is competent to act under Article 50. It may do so where *restitutio in integrum* cannot be made for reasons of constitutional law. It may also do so where *restitutio in integrum* is impossible in the nature of things. The Court's inclusion within Article 50 of this second kind of case bears consideration in the light of the customary international law framework in which the Convention operates. At customary international law, a State adjudged by the Court to be in default of its obligations under the Convention is obliged to make reparation, which, in the case of an individual application, includes, it is reasonable to suppose, reparation for the 'injured party'. Where *restitutio in integrum* is impossible in the nature of things, the appropriate reparation at customary international law will normally be monetary compensation. What the Court has done, therefore, by interpreting Article 50 as covering cases in which *restitutio in integrum* is impossible in the nature of things is to convert a power which, in origin, was intended solely to provide a dispensation for States in constitutional law difficulties into one which also allows the Court to act in place of the respondent State in the determination of any compensation due to 'an injured party' as reparation for a violation of the Convention, or at least to do so after the respondent State had had an opportunity to act. The Court did not discuss the question whether Article 50 could be applied also to cases in which *restitutio in integrum* is possible and in which the respondent State's constitution does not present any obstacle.¹

Thirdly, the Court has established that an applicant does not need to exhaust whatever remedies there are in the legal system of the respondent State in an effort to obtain reparation before applying to the Court for compensation under Article 50. It is sufficient that he has approached the Government concerned and been refused the reparation which he claims. This at least is the position where, as in the cases before the Court, *restitutio in integrum* is impossible. In such a situation, the question whether 'the local law . . . allows only partial reparation' so as to give rise to the application of Article 50 is answered for the Court by the fact that it is simply not possible for a satisfactory local remedy to be made available. It is probably also the position where Article 50 applies because of the constitutional law of the respondent State. Given the Court's emphasis, in the context of Belgium's objection as to admissibility, upon the need to avoid having the applicant spend time exhausting local remedies once again before his case is finally resolved, it seems likely that the Court would answer the same question on the basis of evidence adduced before the Court. The Court's approach in this matter is very welcome in that it helps speed proceedings. As to Judge Verdross's objection, it is arguable that it is sufficient that the respondent State is allowed an opportunity to compensate the 'injured party' before proceedings under Article 50 take place.

Finally, on the Court's finding that there was no damage to the applicants calling for 'just satisfaction', the fact that the claim had been formulated on the wrong basis and

¹ On this question, see the separate opinion of Judge Mosler.

that, in respect of material damage, no arguments had been put by the applicants concerning the costs incurred in having to resort to Strasbourg to obtain the remedy required by Article 5 (4) was crucial. The case has had some effect upon Belgian law, however, although not to the immediate benefit of the applicants (who have only the satisfaction of a declaratory judgment in their favour). The Belgian vagrancy law was amended in August 1971 so that there now is an appeal to the criminal courts from a magistrate's decision ordering a person's detention as a vagrant. The *travaux préparatoires* of the amending legislation make it clear that the intention is to bring Belgian law into line with the Convention.¹

Application of Article 50—no need to apply under Article 25—what amounts to full reparation—the existence of damage

Case No. 4. The *Ringeisen* case (Question of the application of Article 50 of the Convention).² In this judgment the Court, acting under Article 50, awarded the applicant 20,000 German marks compensation against Austria in respect of the violation of Article 5 (3) of the Convention established by the Court in its first judgment in the case of 16 July 1971.³

After the Court's first judgment, the applicant wrote to the Austrian Federal Minister of Justice as the person competent by statute to deal with claims for compensation for detention on remand. The applicant referred to the Court's judgment, gave details of damage suffered as a result of the detention, for which he claimed 100 million Austrian schillings (then about £1.6 million) compensation, and asked the Minister to make proposals for reparation. On 10 September 1971, the Minister replied that his Ministry was not in a position to deal with the claim under the Austrian Constitution. In the meantime, on 18 August 1971, the applicant had written to the Commission asking it to apply to the Court on his behalf under Article 50. On 27 September 1971, the Commission sent the letter on to the Court, whose President decided that the claim should be heard by the chamber of the Court which had considered the case previously. Austria presented written observations on the case; the Commission decided not to do so, but it did pass on to the Court further letters from the applicant with details of his claim. Oral hearings, in which the respondent State and the Commission participated, were held in May 1972.

Austria made an objection as to admissibility on the ground that the Court was not properly seised of the claim since it did not result from a new application under Article 25. The Court unanimously rejected this objection. In its view, the claim was a continuation of proceedings in a case of which the Court was already seised. To argue that a further application under Article 25 was necessary would mean, because of Article 43, the setting up of a new chamber which might well not be composed identically with the chamber that had previously dealt with the case, which would be contrary to the interest in the proper administration of justice. It was also fundamental to the effectiveness of Article 50 that any application of it should occur without the delay inherent in the procedure proposed by the respondent State. It would, moreover, be . . . a formalistic attitude alien to international law to maintain that the Court may not

¹ McNulty, *Stock-taking on the European Convention on Human Rights*, C. E. Doc. DH(72)7, p. 17. The Committee of Ministers, acting under Article 54, has expressed satisfaction with the new law: C.E. Doc. H (73) 4, p. 10.

² *E.C.H.R.*, Judgment of 22 June 1972. French text authentic. The Court consisted of the same Chamber of judges that had heard earlier proceedings in the case; see above, p. 470.

³ See above, p. 470.

apply Article 50 save on condition that it either rules on the matter by the same judgment which found a violation or that this judgment has expressly kept the case open.¹

On the merits of the claim, Austria submitted that full reparation had already been made since the whole of the period spent in detention on remand had been counted as a part of the prison sentence imposed upon the applicant in the fraud case. The Court unanimously rejected this submission. In its view, the deduction of the time spent in detention on remand was relevant to the assessment of compensation but 'does not in any way thus acquire the character of *restitutio in integrum*, for no freedom is given in place of the freedom unlawfully taken away'.² The Court continued:

The consequence of the Government's reasoning would be to deprive Article 5 § 3 of much of its effectiveness, at least in cases where the person detained on remand for more than a reasonable time is found guilty afterwards: in such cases it would suffice, in order to avoid the application of Article 50, that the time spent in detention on remand should be less than the term of the prison sentence pronounced later and should be deducted from it.²

Austria also submitted that the applicant had not exhausted all remedies available to him to obtain reparation under the Austrian legal system since he had only written to the Federal Minister of Justice who was not competent under Austrian law to deal with the claim. Referring to its judgment in the *Vagrancy* cases, the Court confirmed that there was no need to exhaust local remedies before bringing a claim under Article 50. In so far as it might be argued that the Court could only afford 'just satisfaction' under Article 50 'if necessary' and that the Court could only know whether it was necessary to make such compensation if local remedies were exhausted, the Court stated that the necessity referred to in Article 50 'exists once a respondent government refuses the applicant reparation to which he considers he is entitled', which was 'what happened in the present case'.³ The Court then unanimously rejected Austria's submission.

On the question of damage for which 'just satisfaction' was due, the Court rejected, on the facts of the case, claims by the applicant to compensation in respect of financial loss and ill health resulting from his detention. As to the former, no proof of the alleged damage had been brought forward and there did not, in any event, appear to be any necessary link between the alleged loss and the detention. As to the latter, the evidence did not support the applicant's contention. The Court did accept that the applicant had suffered certain non-material damage by being detained for nearly two years contrary to the Convention:

... the applicant protested his innocence and certainly felt such excessive detention on remand to be a great injustice. The detention must have been all the more hard to bear in that it inevitably made it much more difficult for him to conclude a composition for the termination of his bankruptcy.⁴

At the same time, the Court considered that it was necessary to take into account, when assessing the compensation payable in respect of this damage, the facts that the time spent illegally in detention on remand was counted as a part of his prison sentence and that the conditions of detention on remand were less severe than those associated with a prison sentence. Accordingly, the Court, unanimously, awarded the applicant 20,000 German marks (about £2,300). At the hearing, the question was raised whether any sum awarded to the applicant should be paid to him directly and free of any obligation

¹ *E.C.H.R.*, Judgment of 22 June 1972, p. 4.

³ *Ibid.*, p. 6.

² *Ibid.*, p. 5.

⁴ *Ibid.*, p. 7.

or whether it could be attached by his trustee in bankruptcy. The Court stated in its judgment that it could 'leave this point to the discretion of the Austrian authorities'.¹ It then noted that by Austrian law a right to compensation in comparable cases was not subject to such attachment and continued: 'It would seem to be a matter of course that the same exemption from seizure must be allowed in the case of compensation due under a decision of the Court to a person whose detention on remand has been prolonged beyond the reasonable time laid down in Article 5 paragraph 3 of the Convention.'²

The Court in this case clarified further the meaning of Article 50. It expressly confirmed what had been implicit in the *dispositifs* of several of its judgments and in the treatment of the claim under Article 50 in the *Vagrancy* cases, that proceedings under Article 50 occur separately from and after those leading to a decision that a violation of the Convention has occurred. This is not a necessary interpretation of Article 50 in view of the fact that it refers to '*the decision of the Court*'³ and in the light of the Court's ruling that there is no need to exhaust local remedies before bringing a claim under Article 50. It is consistent, however, with the opinion that the respondent State should be allowed an opportunity to effect reparation on its own initiative before the Court intervenes. The judgment also expressly confirms that there is no need for a further application under Article 25 before action is taken under Article 50 and that, as in earlier proceedings in a case, the applicant has no *locus standi* before the Court, although, presumably, the established means by which the applicant's views may be made known to the Court apply at this stage of proceedings as well as at earlier stages.⁴ The applicant's lack of *locus standi* was confirmed by the Court in the course of approving the practice followed in both the *Vagrancy* cases and the *Ringeisen* case by which the applicant applies to the Court for compensation under Article 50 through the Commission.

In addition to these procedural points, the Court's judgment is of great interest as the first in which the Court has actually awarded 'just satisfaction' under Article 50. It confirms that 'satisfaction' will be awarded for non-material damage. The 'satisfaction' was monetary compensation, as it will probably always be. The case was not one of the kind to which Article 50, in terms of its origin, most clearly applies. As in the *Vagrancy* cases, it was one in which *restitutio in integrum* was impossible in the nature of things. As was also true of those cases, the applicant had done no more than seek compensation of the person who seemed to be the appropriate Government Minister before making a claim under Article 50; he had not tried to use such other local remedies as might be available.⁵

¹ *E.C.H.R.*, Judgment of 22 June 1972.

² *Ibid.* In a further, third, judgment delivered on 23 June 1973, the Court, following a request for an interpretation of its judgment of 22 June 1972, held that what it had meant in that judgment was that the compensation should be paid to the applicant 'personally and free from attachment'. It also held, by way of interpretation, that the 20,000 DM should be paid in German marks and in the Federal Republic of Germany, where the applicant was living.

³ Italics added.

⁴ Note that in the *Vagrancy* cases, the Commission submitted a memorandum from the applicant's lawyer with its written observations to the Court; see above, p. 478.

⁵ Note that the applicant wrote to the Commission only a month after the Court's judgment in his favour and before receiving a reply from the Austrian Minister of Justice. He referred to his poor health as a reason for the need for his claim to be considered promptly.

B. DECISIONS OF THE COMMITTEE OF MINISTERS

Trial within a reasonable time (Article 6 (1))

*Case No. 1. Soltikow case.*¹ In July 1952, a criminal charge was laid in West Germany against the applicant, a West German national, for 'defamation of the memory of the deceased'. In March 1954, the applicant was indicted by the Public Prosecutor on this charge. Following a preliminary investigation, the competent court ruled, in July 1957, that there was insufficient evidence for the case to go to trial, but was overruled on appeal in January 1958. The trial lasted from 14 November to 21 December 1960. The applicant was convicted and given a 5 months' suspended sentence. He appealed and, in October 1961, the appeal court set aside the conviction because certain witnesses for the applicant had not been called and ordered a rehearing. In March 1964, the competent court, after having heard further witnesses and received evidence by rogatory commissions from France, Italy and Israel, proposed that the case be discontinued, but, in the face of objections from the applicant, the trial was set for June 1964. When, however, the applicant asked that further foreign evidence be examined before the trial, the court decided in July 1964 to discontinue proceedings against the applicant on the grounds that since the applicant's guilt could only be minimal and since the consequences of his acts were insignificant, the case did not warrant further lengthy and expensive proceedings.

In an application lodged on 11 September 1962, the applicant alleged a number of violations of the Convention, including a violation of the 'trial within a reasonable time' guarantee in Article 6 (1). The Commission admitted the application for consideration on its merits in respect of this allegation only. In the course of considering the allegation on its merits, the Commission decided that Article 6 (1) began to apply not when the charge was first laid against the applicant in July 1952, but when the indictment was preferred in March 1954. It had, therefore, taken 10 years and 3 months to determine the charge against the applicant in the sense of Article 6 (1). In choosing the later date as the one from which Article 6 (1) began to run, the Commission referred to the *Neumeister* case² in which the Court had ruled that it began to apply when a person had been charged with an offence. The Commission then stated:

In determining the point at which a person can be considered as having been charged within the meaning of Article 6, paragraph (1), of the Convention, regard must be had to the particular case concerned. On the one hand the word 'charge' in the said Article cannot be construed in the terms of the domestic law of any of the Contracting States but must be interpreted independently. On the other hand, it may be necessary to have regard to the whole system of criminal procedure of the State concerned in order to interpret and thus delimit the notion of 'charge' for the purpose of applying that notion to the facts of a particular case.³

Applying this approach to the West German legal system, the Commission stated:

Having examined the particular circumstances of the present case in this light, the Commission has come to the conclusion that the applicant was not charged within the meaning of Article 6, paragraph (1), until 23 March 1954, being the date on which the indictment was preferred. Although proceedings with regard to the information laid by Günter vom Rath had in fact commenced almost one year and eight months earlier, no

¹ A. 2257/64. Decisions as to admissibility: *Collection of Decisions of the E.C.H.R.*, 21 (1966), p. 72 (partial decision); *Yearbook of the E.C. on Human Rights*, 11 (1968), p. 181 (final decision). Report of the Commission: adopted on 3 February 1970. Resolution of the Committee of Ministers: C.E. Doc. DH (71) 1.

² Loc. cit. (above, n. 465 p. 3).

³ Report of the Commission, p. 17.

preliminary investigation (*gerichtliche Voruntersuchung*) had been requested before the date of the indictment. It is also noted that the applicant was not under arrest at this stage, or indeed at any other stage of the proceedings.¹

Following its examination of the case, the Commission concluded by 8 votes to 4 that 'in the particular circumstances of the present case the length of the criminal proceedings against the applicant before the German courts did not exceed a reasonable time within the meaning of Article 6, paragraph (1), of the Convention'. The 'particular circumstances' were the following:

In this respect there is no doubt that this case was of considerable complexity because of the difficulties in obtaining evidence from several different sources concerning events which took place many years earlier in a foreign country. This, in itself, however, could not have justified the length of the proceedings.

The Commission finds, however, that the German judicial or other competent authorities at no stage of the proceedings seem to have neglected their duty to advance the course of the proceedings. It results clearly from the schedule in Appendix IV that at no stage during the ten years in question did any considerable period elapse without some procedural step being taken. The case passed up and down in the judicial hierarchy several times, and many procedural issues were singled out for separate consideration at the request of the applicant. In its submissions the respondent Government has argued that the length of the proceedings are due primarily to the 'incalculable' number of complaints, submissions and applications made by the applicant during the course of the proceedings.²

With regard to the conduct of the applicant in the proceedings against him, the Commission found support for the West German contention in the manner of the applicant's conduct before the Commission.

On 19 February 1971, the final decision in the case was taken by the Committee of Ministers. Agreeing with the opinion of the Commission, the Committee decided that there had been no violation of the Convention.

The case is of interest as one that underlines the curious situation that results from the existence of two alternative forums for the final decision in cases arising under the Convention. In the *Neumeister* case, the final decision on the question of a violation of the 'trial within a reasonable time' guarantee in Article 6 (1) had been taken by the Court after full argument on the question before it. In the present case, the same question was decided by the Committee of Ministers, a non-judicial body, after nothing like the same consideration of the case. In the *Neumeister* case, the fully reasoned report of the Commission was followed by a distinct and equally fully reasoned judgment of the Court, the final authority on the meaning of the substantive guarantee in the Convention; in the present case, it was not. Possibly the Commission decided not to refer the case to the Court because the latter had already given a sufficient indication of the meaning of the guarantee in Article 6 (1) in question (although it would have been helpful to have had the Court rule upon the Commission's approach to the question whether Article 6 (1) began to run only from the time that the applicant was charged)³ and of the standard to be adopted in its application. It may have been relevant that the Commission had found no violation of the Convention or that it thought the case a straightforward one on its facts (although the Commission was not unanimous in its conclusion).⁴ But whatever the reason, the consequence is

¹ Report of the Commission, p. 18.

² Ibid.

³ See the comment on the *Ringeisen* case (above, p. 473 n. 5).

⁴ This is conjecture because the Commission is not required to give any reason for its decision on the question of reference to the Court.

unnecessary inequality in the treatment of cases if some are referred to the Court and others are not; some cases receive a full second hearing by a separate and authoritative judicial body, others do not.¹ It may be that there are exceptional cases in which the Commission's discretionary power to refer cases to the Court should still not be exercised.² It is arguable, however, that despite the continuing risk that contracting parties may withdraw their acceptance of the Court's jurisdiction, the consideration just mentioned should make a reference to the Court, when possible, the normal rule.

C. DECISIONS OF THE EUROPEAN COMMISSION OF HUMAN RIGHTS

Right of access to the civil courts (Article 6 (1))—right to respect for correspondence (Article 8)—friendly settlement

*Case No. 1. Knechtel case.*³ In this case, the applicant, described as a stateless person, had a leg amputated in 1967 while serving a prison sentence in the United Kingdom. While still in prison, he sought to bring a civil suit against the Home Office for allegedly negligent medical treatment resulting in the amputation. Under the Prison Rules,⁴ he had to obtain the permission of the Home Secretary before he could communicate with a solicitor to do this. Permission was refused because 'prisoners were not usually allowed to institute legal proceedings against the prison authorities unless they could make out a *prima facie* case of negligence',⁵ and in this case the applicant, despite requests, had not given sufficient details of his complaint to permit the Home Secretary to find that a *prima facie* case existed. In 1969, the applicant brought his application alleging violations of Articles 6 and 8 of the Convention. He alleged that the United Kingdom had infringed the right of access to a court in civil proceedings that was impliedly protected by Article 6 (1) and that it had also violated the right to respect for correspondence guaranteed by Article 8 (1).

On 16 December 1970, the Commission declared the application admissible in respect of both allegations. On the question of the right of access under Article 6, the Commission stated:

Whereas the Commission observes that the question whether Article 6 (1) of the Convention guarantees the right of access to the courts has never been expressly decided; whereas, in the light of the submissions of the parties, the Commission considers that the application raises an important issue concerning the interpretation of the Convention whose determination should depend upon an examination of the merits of the application; whereas therefore the application cannot in this respect be considered as being manifestly ill-founded within the meaning of Article 27(2) of the Convention;⁶

On the right to respect for correspondence, the Commission stated:

Whereas the remaining issues as to the alleged interference with the applicant's correspondence, raised by the refusal of permission to write to the Law Society or to consult

¹ It will be interesting to see, in this connection, what weight the Court subsequently gives to the decision of the Committee of Ministers in the present case.

² See Petré, 'La saisine de la cour Européenne par la Commission européenne des droits de l'homme', *Mélanges Modinos* (1968), p. 233.

³ A.4115/69. Decision as to admissibility: *Yearbook of the E.C. on Human Rights*, 13 (1970), p. 730. Report of the Commission: adopted on 24 March 1972.

⁴ S.I. 1964, No. 388, Rule 34 (8).

⁵ *Yearbook of the E.C. on Human Rights*, 13 (1970), p. 738.

⁶ *Ibid.*, p. 760.

a solicitor, are closely connected with the wider questions of the existence of a right of access to the courts and of the scope of any such right; whereas the Commission therefore considers that these remaining issues depend for their determination on an examination of the merits of the main issue, and that the application cannot be rejected in this respect as being manifestly ill-founded or on any other ground;¹

In its Report of 24 March 1972, the Commission announced that a friendly settlement had been reached in accordance with Article 28 (b) of the Convention. By it, the applicant agreed to accept £750 as an *ex gratia* payment from the British Government in full and final satisfaction of his complaint that he had not been allowed to communicate with a solicitor while in prison. The United Kingdom did not admit responsibility under the Convention. The Commission accepted the settlement as being consistent with the Convention. In so doing, it took note of the British Government White Paper laid before Parliament on 10 December 1971² which indicated an important alteration in practice on the part of the Home Office in cases like the *Knecht* case. The White Paper reads:

Instructions have, therefore, been given that with immediate effect if a prisoner has suffered some physical injury or disablement, or impairment of his physical condition, and claims damages for the alleged negligence of the prison authorities or staff, he will be allowed to consult a solicitor and give instructions for the institution of proceedings in accordance with the latter's advice without restriction unless there are overriding considerations of security. This new practice will apply to cases involving alleged medical negligence. It is already the current practice to grant access freely to legal advice and the courts in cases involving industrial injury or other accidents on prison premises.

It is interesting that the applicant had earlier taken his case to the British Parliamentary Commissioner, or Ombudsman, who found no maladministration and hence did not make a recommendation in the applicant's favour. The Commissioner did, however, suggest to the Home Office that it review the rule governing permission to obtain legal advice in cases such as the applicants'. The Home Office did this but found no need to make any change. Then the House of Commons Select Committee on the Parliamentary Commission for Administration examined the question and recommended in July 1971 that further consideration be given to it.³ Whether the pending proceedings before the Commission or the recommendation of the Select Committee had more to do with the change of mind of the Home Office is unknown. In terms of the effectiveness of the Convention, however, it seems likely that the application to Strasbourg was not totally irrelevant to the change of administrative practice introduced, and the compensation paid to the applicant was wholly attributable to it.⁴

In one sense, a less fortunate consequence of the settlement of the case is that there will now be no ruling in it on the substantive issues raised. The question whether the right of access to the courts in civil proceedings can be read into Article 6, in particular, is an important one.⁵

¹ *Yearbook of the E.C. on Human Rights*, 13 (1970) p. 762.

² Cmnd. 4846.

³ Second Report from the Select Committee on the Parliamentary Commissioner for Administration, Session 1970/71, p. xii.

⁴ Note that the applicant began civil proceedings in negligence against the Home Office on 4 December 1970, following release from prison.

⁵ The question is, however, still before the Commission in the *Golder* case, A. 4451/70, *Collection of Decisions of the E.C.H.R.*, 37 (1971), p. 124, which was admitted for consideration on its merits on 30 March 1971.

Trial within a reasonable time (Article 6 (1))—friendly settlement

*Case No. 2. Sepp case.*¹ Criminal charges alleging fraud were laid in West Germany against the applicant in this case, a West German national, in July 1961. Following the preliminary investigation, an indictment was filed against the applicant and four other persons in January 1963. Further investigations were conducted and a supplementary indictment was filed in February 1964. The trial of all of the accused was arranged for June 1965 but was postponed because two of the accused, not including the applicant, were physically unfit to stand trial. By 1967, three of the accused had become unfit to stand trial and proceedings against them were dropped. The remaining two accused, including the applicant, were tried in October–November 1967. The applicant was convicted and sentenced to 2 years and 3 months imprisonment. His appeal was dismissed in August 1968. Proceedings in the case had taken 7 years from the laying of the charges against him to the final decision on appeal. The applicant lodged an application with the Commission on 2 December 1968 which was declared admissible by the Commission on 17 July 1970 in respect of the applicant's allegation that, contrary to Article 6, he had not been tried within a reasonable time.² At the admissibility stage, the applicant argued that the preliminary investigation of the case had not been conducted efficiently; that there had been undue delay in bringing the case to trial at the time originally proposed; and that, unlike the position in the *Neumeister* case,³ it would have been possible to have separated at an early date the proceedings against the applicant from those against the persons unfit to stand trial. In reply, the West German Government claimed that the case had been brought to trial with the greatest possible expedition and emphasised its complexity. The Commission declared the application admissible on the ground that the 'complaint is of such complexity that its determination should depend upon an examination of its merits'.⁴

In its report of 24 March 1972, the Commission indicated that a friendly settlement in the sense of Article 28 (b) had been reached by the parties that was consistent with the Convention. The settlement provided that for a probationary period of 2 years the sentence imposed upon the applicant would, by way of a pardon, be suspended and that it would be fully remitted at the end of that period if the conditions of probation were satisfied; that an order would be made to the effect that the conviction and sentence of the applicant would not be mentioned in the certificate of good conduct within the meaning of the Federal Central Registry Act of 18 March 1971, during the probationary period, and that, in the case of a final remission thereafter, they would be expunged; that the costs of the criminal proceedings against the applicant would, by way of a pardon, be waived; and that the appropriate authority would confirm the terms of the present settlement in case of any request for information by the Chamber of Commerce and would declare that there was no reason why the applicant should not be readmitted as a chartered accountant. In return, the applicant withdrew his application and undertook not to make any further claims against West Germany at any level in his case.

The case is the fourth in which the friendly settlement procedure in Article 28 (b) has been used successfully. The terms of the settlement are, one would imagine, as satisfactory for the applicant, who had not served any of his sentence by the time that the

¹ A.3897/68. Decisions as to admissibility: *Yearbook of the E.C. on Human Rights*, 13 (1970) pp. 626, 640. (Partial and final decisions). Report of the Commission: adopted on 24 March 1972.

² A number of other allegations under Article 6 were rejected. The applicant was not detained pending trial so there was no question of a violation of Article 5 (3).

³ Loc. cit., above, p. 465, n. 3

⁴ *Yearbook of the E.C. on Human Rights*, 13 (1970), p. 664.

settlement was concluded, as any outcome of a ruling by the Court in his favour would have been likely to be. Moreover, the settlement has been achieved more quickly than any final determination of the case at Strasbourg would have been made.

Exclusion of persons on racial grounds as 'degrading treatment' (Article 3)—'security of person' (Article 5)—discrimination on racial grounds (Article 14)—right to respect for family life (Article 8)

*Case No. 3. East African Asians cases.*¹ By the end of 1972, the Commission had received complaints against the United Kingdom from some 280 East African Asians.² The first applications were received early in 1970. On 10 October and 18 December 1970 the Commission admitted 25 and 6 applications respectively for consideration on their merits. All 31 applicants were citizens of the United Kingdom and Colonies or British protected persons holding United Kingdom passports refused admission into the United Kingdom, or refused permission to enter and remain there permanently, under the Commonwealth Immigrants Act 1968.³ All of the applications were admitted in so far as they alleged violations of Articles 3, 5 and 14. The Commission noted that the United Kingdom had not ratified the Fourth Protocol to the Convention, which provides, in Article 3 (2), that: 'No-one shall be deprived of the right to enter the territory of the State of which he is a national'; and that the purpose of that Protocol was to supplement the Convention and the First Protocol. The Commission continued, however:

Whereas the Commission is of the opinion that, quite apart from any consideration of Article 14, discrimination based on race could, in certain circumstances, of itself amount to degrading treatment within the meaning of Art. 3 of the Convention; whereas the Commission considers that it is generally recognised that a special importance should be attached to discrimination based on race, and that publicly to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity; whereas, therefore, differential treatment of a group of persons on the basis of race might be capable of constituting degrading treatment in circumstances where differential treatment on some other ground, such as language, would raise no such question;

Whereas the Commission notes that at the time of the independence of Kenya and Uganda, the applicants had the option of acquiring local citizenship, an option which had to be exercised within a period of two years, and that it was only after the expiry of this period that the applicants' right to enter the United Kingdom was removed by the Commonwealth Immigrants Act 1968;

Whereas the Commission has considered the remaining facts of each of the individual applications as these appear from the submissions of the parties; whereas the Commission finds, on the basis of this preliminary examination of the information and arguments, submitted by the parties, that the complaints by each of the applicants (excluding the second applicant in Application No. 4423/70) concerning the actions of the United Kingdom authorities, raise issues of law and fact whose determination should depend upon an examination of the merits of the cases;⁴ . . .

With regard to the allegations made under Article 5, the Commission stated:

Whereas the applicants have also alleged that the actions of the United Kingdom authorities infringed their right to 'security of person' guaranteed by Art. 5 of the

¹ A.4403/70 and others; decision as to admissibility: *Yearbook of the E.C. on Human Rights*, 13 (1970), p. 928. A.4501/70 and others; decision as to admissibility: *Collection of Decisions of the E.C.H.R.*, 36 (1970), p. 127.

² The figure is taken from C.E. Doc. H (73) 4, p. 6.

³ See now the Immigration Act 1971.

⁴ *Yearbook of the E.C. on Human Rights* 13 (1970), pp. 994-6.

Convention; whereas the respondent Government contended that the expression 'security of person', taken in the context of Art. 5, should be restricted to the notion of physical security; whereas, however, the question arises whether, in the context of Art. 5, the term should be given a wider interpretation so as to protect persons from such arbitrary action on the part of the authorities as might disturb their daily life and whether Art. 5 thus guarantees, as the applicants have submitted, the right to some form of assurance as to the future; and whereas, in this connection, the applicants made further submissions as to the facts which the Commission has already considered in relation to the allegations of violations of Art. 3 of the Convention;

Whereas the Commission is of the opinion that it is not its function, at the stage of admissibility, finally to determine the issues which may arise on an examination of the merits; whereas the Commission has already found, in relation to Art. 3, that the complaints by each of the applicants (excluding the second applicant in Application No. 4423/70) concerning the actions of the United Kingdom authorities raise issues of law and fact whose determination should depend on an examination of the merits of the cases; whereas those same issues may be found to include questions arising under Art. 5 of the Convention insofar as that Article guarantees the right to security of person; whereas again the determination of any such questions should depend on an examination of the merits of the cases;¹ . . .

The same reasoning applied, the Commission thought, to the applicants' complaints in so far as they claimed discrimination against them through the operation of the Commonwealth Immigrants Act 1968 contrary to Article 14 of the Convention as read in conjunction with Articles 3 and 5. The Commission also admitted allegations by certain of the applicants of violations of Article 8 because of the fact that they could not join members of their families already in the United Kingdom.

Subsequent applications have been referred to the British Government but no decisions as to admissibility have been taken pending the outcome of the friendly settlement procedure still being applied to the 31 applications that have been admitted. In fact, it seems at least 200 of the applicants have been admitted into the United Kingdom since proceedings in Strasbourg began² and arrangements for the admission of East African Asians have been altered so that the problem has been eased.³ No formal friendly settlement had been reached, however, by the end of 1972 and the cases remain on the Commission's list. Clearly, they raise important questions concerning the scope of Articles 3 and 5.

Inter-State Application (Article 24)—right to life (Article 2)—an 'administrative practice'—interrogation techniques and Article 3—detention and internment without trial (Articles 5 and 6)—discrimination on grounds of political opinion (Article 14)—criminal law with retroactive effect (Article 7)

*Case No. 4: Eire v. United Kingdom.*⁴ On December 16 1971 and 8 March 1972, Eire lodged applications against the United Kingdom under Article 24 of the Convention in respect of events in Northern Ireland. On 1 October 1972, the Commission declared the first application admissible in part. The second application was withdrawn by Eire in the light of an undertaking by the British Government.

In its decision as to admissibility on the first application, the Commission declared admissible allegations concerning Articles 1, 3, 5 and 6 and allegations concerning the

¹ Ibid., p. 996.

² C.E. Doc. C (72) 24.

³ McNulty, loc. cit. (above, n. 482 p. 1), p. 32.

⁴ A.5310/71 (first application) and A.5451/72 (second application). Decision as to admissibility of A. 5310/71 and decision to strike off the list A.5451/72, *Collection of Decisions of the E.C.H.R.* 41 (1973), p. 3.

last two of these Articles read in conjunction with Article 14. It rejected as inadmissible a further allegation based on Article 2.

The Commission ruled first upon the allegation made under Article 2. Eire alleged that the deaths of 22 persons in Northern Ireland at the hands of security forces in the course of public incidents and disturbances amounted to a violation of the right to life. It did not bring this claim in respect of injury to any particular individual or individuals; it contended instead, in this Article 24 application, that the deaths resulted from an 'administrative practice' that was in itself a violation of the right to life guaranteed in Article 2. In this way, Eire hoped to avoid the application of the local remedies rule in Article 26, in accordance with the ruling of the Commission in the *First Cyprus* case.¹ The Commission confirmed its ruling in that case but noted that in the *First Greek* case² it had established that the existence of an administrative practice in this context has to be shown 'by means of substantial evidence'³ and this had not been done here. Consequently Article 26 applied and, since Eire had not shown that local remedies had been exhausted, the allegation was inadmissible.

With regard to Article 3, Eire alleged that persons in Northern Ireland had been subjected to torture and to inhuman and degrading treatment and punishment contrary to that Article. It referred to the five techniques (hooding, wall-standing, subjection to noise, deprivation of food and restricted diet) shown by the Compton Report to have been used by the authorities in the interrogation of persons in Northern Ireland and to other forms and instances of ill-treatment. Here, too, Eire claimed the existence of an 'administrative practice' contrary to Article 3. The Commission agreed that the Compton Report techniques constituted an 'administrative practice' in the sense of the *First Cyprus* case so that it was not necessary for Eire to show that the local remedies that undoubtedly existed for individuals subjected to these techniques (in most cases, civil claims of assault⁴) had been exhausted. The United Kingdom, however, pointed out that the Compton Report techniques were no longer in use and claimed that such other evidence of ill-treatment as existed did not raise any question of a violation of Article 3. The United Kingdom then submitted that it followed from the general function of the Commission that in this situation the Commission ought not to take up the Article 3 allegation since it related to possible violations of the Convention that were no longer current. The Commission rejected this submission:

Without in any way pronouncing at this stage on the question whether or not the allegations under Art. 3 are well-founded, the Commission has carried out a preliminary examination of the evidence and other material submitted by the applicant Government in support of their allegations of forms of ill-treatment other than the five techniques. The Commission observes first that, while generally stating that the facts alleged are not admitted, the respondent Government have not offered any counter-evidence or made detailed comments on the material presented by the applicant Government.

Secondly, the Commission finds that the allegations of ill-treatment contrary to Art. 3, must be examined as a whole and the other forms of ill-treatment alleged cannot be considered in isolation from, or without having regard to, the five techniques constituted an administrative practice to which the domestic remedies' rule in Art. 26 does not apply. On the evidence now before it, the Commission finds that other forms of ill-treatment are alleged as forming part of the admitted administrative practice of interrogation in depth and that, therefore, the domestic remedies' rule cannot be properly applied to these allegations.

¹ *Yearbook of the E.C. on Human Rights*, 2 (1958-9), p. 182.

² *Ibid.*, 11 (1968), p. 690.

³ *Ibid.*, p. 726.

⁴ A number of such claims have been brought.

The further examination of all other questions regarding the extent of such an administrative practice and its consistency with the provisions of the Convention relates to the merits and cannot be considered by the Commission at the stage of admissibility.¹

With regard to Articles 5 and 6, Eire alleged that these had been violated by the detention and internment of persons without trial under the Civil Authorities (Special Powers) Act (Northern Ireland) 1922. As to Article 5, the United Kingdom invoked in reply its derogation from its obligations under the Convention made under Article 15 in respect of Northern Ireland. As to Article 6, the United Kingdom denied that it applied to persons not charged with criminal offences. The Commission accepted Eire's submission that in respect of applications under Article 24 these arguments put by the United Kingdom were irrelevant at the admissibility stage since Article 27 (1) and (2) did not apply. With regard to the argument based upon Article 15 in particular, the Commission stated:

In particular, an application under Art. 24 cannot be rejected in accordance with para. (2) of Art. 27 as being manifestly ill-founded and it follows that the question whether such an application is well-founded or not and whether or not there is a consequent breach of the Convention are solely questions relating to the merits of the case. Therefore, the effects of derogation made by the respondent Government under Art. 15 of the Convention cannot be considered at the present stage of admissibility. Consequently, the Commission reserves for an examination of the merits the question whether the measures concerned were or are justified under Art. 15 (see the decisions on the admissibility in the *First Cyprus* case, *Yearbook* 2, pp. 730, 768).²

The Commission also declared admissible Eire's allegation based upon Articles 5 and 6 read in conjunction with Article 14. The particular allegation here was that detention and internment had been and were being carried out 'with discrimination on grounds of political opinion'.² The Commission found that this allegation was so closely related to the allegations already admitted for consideration under Articles 5 and 6 by themselves that it must be dealt with on the merits with those other allegations.

Finally, the Commission reserved without comment 'to an examination of the merits the question whether there has been a breach of Article 1 with regard to those parts of the application which it has found to be admissible'.³

The second application concerned the Northern Ireland Act, 1972. By a regulation made under the Special Powers Act, 1922, British army officers were authorized to disperse an unlawful assembly. Persons refusing to disperse were guilty of a criminal offence. Following a Northern Irish case⁴ in which a person convicted under the regulation had had his conviction quashed because, the court held, the dispersal power was *ultra vires* the Government of Ireland Act, 1920, and hence invalid, Westminster adopted the Northern Ireland Act, 1972, which made the power lawful retroactively. In its second application, Eire argued that the Act of 1972 conflicted with Article 7 of the Convention, since it allowed persons to be convicted for acts which were not crimes at the time when they were committed. The application was withdrawn when the United Kingdom Attorney-General gave an undertaking in proceedings before the Commission that the Act of 1972 would not be applied retroactively. The Commission

¹ *Collection of Decisions of the E.C.H.R.*, 41 (1973), p. 86.

² *Ibid.*, p. 88.

³ *Ibid.*, p. 90.

⁴ *R. v. Londonderry Justices, ex parte Hume*, 23 February 1972; digest in *Northern Ireland Law Quarterly*, 23 (1972), p. 206.

thereupon struck the application off its list: it found 'no reason' of a general character affecting the observance of the Convention which would justify the retention of this application on its list of cases.¹

At the end of 1972, arrangement had been made for the hearing of the first application on its merits.

D. J. HARRIS

¹ *Collection of Decisions of the E.C.H.R.*, 41 (1973), p. 91.

REVIEWS OF BOOKS

British International Law Cases. Vol. 9, Supplementary Volume 1966-1970. British Institute, *Studies in International and Comparative Law*, No. 1. London: Stevens & Sons Ltd.; Dobbs Ferry, N.Y.: Oceana Publications, 1973. xxxi + 996 pp. £19.

This volume carries the collection to the end of 1970 and includes a consolidated index for the complete series. The profession, in particular, will be indebted to the industry and persistence of Professor Clive Parry and Mr. John Hopkins, the learned editors of the latest volume. From *The Times* and other sources cases have been drawn which fail to be reported in the more standard series of law reports.

The collection includes the decision in *Arkins*, [1966] 1 W.L.R. 1593 concerning the application of the Backing of Warrants (Republic of Ireland) Act, 1965. Although within the time limits of the volume, the other reported decision on the Act, *Keane*, [1972] A.C. 204, D.C. and H.L., is omitted. No doubt the explanation is that *Keane* went up to the House of Lords. At any rate in *Keane* reference is made to another decision of the Divisional Court relating to the Act, *Dwyer*, 13 April 1970, which is unreported. It would be useful if the supplementary volumes were to include unreported decisions, at least if search is obviated by helpful reference in reported cases. Transcripts are not difficult to obtain.

IAN BROWNLIE

European Conventions and Agreements. Strasbourg: Council of Europe. Vol. I: 1949-1961 (1971), 370 pp., £5.50; Vol. II: 1961-1970 (1972), 490 pp., £5.50; Index (1972), 254 pp., £2.25.

These two volumes provide a useful and welcome collection of the treaties concluded within the Council of Europe. Although they do not constitute 'official publication', which continues to be the function of the *European Treaty Series*, both volumes have the advantage of bringing together the agreements concluded, together with, in each case, a chart showing signatures and ratifications, and also the French and English versions of reservations and declarations made by the signatory and contracting States. The aim expressed in the Preface, which is to meet the practical need of supplying a convenient working instrument, is amply fulfilled by the result.

G. S. GOODWIN-GILL

The E.E.C. Rules of Competition. By WILLY ALEXANDER. Deventer: Kluwer B. V., London: Kluwer Harrap Handbooks, 1973. xvi + 187 pp. (including appendices, lists of decisions and index). £4.90.

This short book (112 pages of text) by a Member of the Bar of The Hague is intended to be a descriptive guide for barristers, solicitors and legal advisers to industry who are unfamiliar with the E.E.C. Competition Rules. Descriptions of various aspects

of Articles 85 and 86 of the E.E.C. Treaty and of Article 65 of the E.C.S.C. Treaty are divided among seventeen brief chapters. Principal topics covered are: Prohibitions and Exemptions under Article 85; Prohibition and Scope of Article 86; Enforcement by the Commission of the European Communities; Private Suits; Notification; Prices; Territorial and Quantitative restrictions; Exclusive dealing; Joint Research and Development; Specialization; Joint Selling and Purchasing; Cooperation and Mergers. The longest chapter, covering Exercise and Licensing of industrial property rights, covers 13 pages. The appendices contain the consolidated English texts of pertinent Regulations and Announcements as well as helpful chronological lists of relevant decisions of the Commission and the Court of Justice of the European Communities up to December 1972. These lists of decisions give citations to the *Official Journal*, *Recueil de la jurisprudence de la C.J.C.E.*, *Common Market Law Reports*, *Common Market Reporter* and *Common Market Law Review*.

The presentation of the subject matter is very concise and often heavily dependent upon reference to cases whose factual backgrounds are not explained. In a few instances this brevity may mislead a reader unfamiliar with the topic, especially since there is no bibliography and no reference is made to relevant scholarly literature or to analogous situations in similar restrictive practices legislation of other countries. For example, the text on page 28 leaves the impression that the Court of Justice has never indicated its position on the extra-territorial scope of Articles 85 and 86. However, several court decisions, especially *Béguelin*, contain *dicta* on this issue. Moreover, an obvious error in the text on page 37 (referring to enforcement of pecuniary obligations imposed by the Commission under Article 190 of the E.E.C. Treaty, rather than the correct Article 192) detracts from the otherwise accurate case references. Despite these deficiencies and the inevitable problem of subsequent developments in this rapidly developing area of Common Market law, e.g. the Court of Justice decisions in *Continental Can* (1973 CMLR 199) and *DeHaecht v. Wilkin* (1973 CMLR 287), this book is a useful general introduction to the E.E.C. Rules of Competition as they stood in December 1972.

J. P. GRIFFIN

Grotian Society Papers 1972: Studies in the History of the Law of Nations. Edited by C. H. ALEXANDROWICZ. The Hague: Martinus Nijhoff, 1972. 265 pp. Gld. 45.

This collection of papers is the third to be published by the Grotian Society under the editorship of Professor Alexandrowicz. (The two previous collections were reviewed in volumes 42 and 44 of this *Year Book*). While the eight papers included in the collection cover a wide range of subjects they all illustrate the relevance of the history of international law to current problems facing the international order. At a time when historical studies are fast losing favour in law schools on account of their inability to compete with sociological and policy-orientated studies in the 'relevancy stakes', the Grotian Society's collection provides a timely reminder of the indispensability of historical inquiry to a proper study of international law.

Appropriately, the classical jurists, Grotius and Vattel, form the subject of two papers. In 'The Influence of Grotius upon the Development of International Law in the Eighteenth Century' Professor J. G. Starke questions the influence of Grotius during the eighteenth century by means of a study of his impact on legal scholarship, State practice and judicial decisions. While he effectively shows that Grotius' influence

was less considerable than is generally believed he concedes that he retained an 'inspirational appeal' as the author of the first systematic work on international law. Undoubtedly Vattel exercised more influence on the development of international law during this period than Grotius. The reason for this is lucidly explained by Dr. F. S. Ruddy in 'The Acceptance of Vattel'. He attributes Vattel's popularity in large measure to his readable style and systematization, his use of French rather than Latin, his conformity with the literary traditions of the time and his political relevancy. Whatever their merits and demerits, the works of these classical writers continue to form part of 'living' international law. Readers may be interested to know that in a recent attempt to compel the South African Government to permit the leader of the proscribed Pan Africanist Congress, Robert Sobukwe, to leave South Africa, counsel had recourse to Grotius and Vattel to support the argument that a citizen has a right to leave his country. (*Sobukwe and another v. Minister of Justice* (1972), (1) *South African Law Reports* 693 (AD)).

Professor D. P. O'Connell adds to his wealth of writings on State succession a paper on 'State Succession and the Theory of the State' in which he analyses pre-colonization doctrine. The views of jurists from Grotius and Coccejus to Rousseau and Dahm are examined in detail and Professor O'Connell shows how historical events of the time, such as the Risorgimento and the cession of Alsace-Lorraine, as well as changing jurisprudential creeds, influenced the doctrine of State succession. This 50-page exposition of the jurisprudence of State succession, tracing the evolution from a strictly doctrinal to a flexible approach towards State succession, forms an essential supplement to Professor O'Connell's *State Succession in Municipal Law and International Law* (1967) in which this subject receives considerably less attention.

In 'English Nationality Law: *Soli* or *Sanguinis*' J. M. Ross uncovers the roots of British nationality laws and shows the extent to which recourse has been had to both *jus soli* and *jus sanguinis* in the conferment of nationality. The adoption of both principles inevitably results in large scale dual nationality with all its attendant difficulties and the reviewer agrees with the writer that more is to be gained by international attempts to reduce dual nationality than by a recasting of the principles upon which British nationality law is founded.

The widely held view that the international concession agreement is the 'by-product of 19th century capitalism' is convincingly queried by Dr. Peter Fischer in 'Historic Aspects of International Concession Agreements' in which he examines the feudal roots of the concession agreement and describes the fascinating Taxis postal concessions. Problems of non-State entities and international legal personality in general are discussed in this essay as well as in Dr. J. Mössner's 'The Barbary Powers in International Law (Doctrinal and Practical Aspects)' and Dr. François Eustache's 'Le Statut des envoyés pontificaux en France au XIX Siècle (1801-1904)'. These papers provide an invaluable historical perspective to the question of statehood and international personality. At the same time they furnish the 'modern' international lawyer, preoccupied with the problems of the nuclear age, with important insights into the historical events which have shaped contemporary international law.

'The Modern Pattern of War and Peace' is the subject of a brief but incisive essay by Professor F. H. Hinsley in which he examines changing forms of belligerency and those factors which have reduced the frequency of war in modern times. One of these factors is identified as the improved control of governments over the resort to force. In this connection it may be argued that the pattern is changing as the result of the increase in the number of groups committed to violence which operate free from the

control of any State. Certainly the wars of national liberation, which dominate the present international scene, do not fit easily into the pattern outlined by Professor Hinsley.

The 1972 *Grotian Society Papers* constitute an important contribution not only to the history of the law of nations but also to contemporary international law. Their publication is to be greatly welcomed.

JOHN DUGARD

New States and International Law. By R. P. ANAND. Delhi: Vikas Publishing House Ltd., 1972. 119 pp. Rs. 22

The author, in the teeth of orthodoxy, has produced a book which throws light on a chapter of international law which is sorely in need of spring cleaning. While the Family of Nations has undergone a revolutionary 'State explosion' (its members rising to 135 States from all continents), we still have an international law for universal consumption which is mainly based on the history of one continent. The author deplores its Eurocentricity and challenges international lawyers to rewrite the history of the law of nations. Leopold Ranke had divided nations into those which made history (*geschichtsbildende*) and those without history (*geschichtslose*). The first are civilised, the second are not. The history of Afro-Asian political institutions and Afro-Asian civilizations has meanwhile been written but it has not yet penetrated into the minds of those international lawyers who still cling to Ranke's distinction, and consider treaties and other transactions concluded by Afro-Asian countries in the past as being in a legal vacuum. Hundreds of these treaties and documents relating to negotiations which promoted the extensive trade between Europe and Afro-Asian countries in the past are relegated to a doubtful position. This is *semi-positivism* using that part only of the historical material in support of principles of international law which is considered as useful for upholding an *a priori* conceived ideology. A number of modern historians such as Van Leur, Drechsler, Murakovsky and others have condemned the discriminatory classification of Ranke and of his followers in international law as non-scientific and untenable and other historians are bound to agree. But international lawyers (and Professor Anand quotes a number of them) persist in the concept of *universal* international law based on European history and European civilization. The author makes a courageous attempt to reconsider the inescapable facts of history and to meet the claims of Afro-Asian States to their proper place in the Family of Nations (past and present). In fact many of the States which existed legally in the past claim today 'reversion to sovereignty'. In the second part of the book Professor Anand gives us a sketch of present-day problems of New States and he analyses the question to what extent these States require modification of the system of international law which they find at their birth or rebirth. In the framework of a book of 119 pages there was obviously no room for going into details. It would of course be interesting to consider some of the relevant problems such as the attitude of the New States to international customary law, to *jus cogens* and other problems. Perhaps in a further edition the author would let us have the benefit of his views.

CHARLES HENRY ALEXANDROWICZ

The Ross Dependency. By F. M. AUBURN. The Hague: Martinus Nijhoff, 1972. x + 91 pp. Gld. 17.50.

This work, written more or less explicitly from a New Zealand point of view, is in part a general discussion of the problem of territorial claims in the Antarctic, and in part an examination of the New Zealand claim to the Ross Dependency and the Ross Ice Shelf. The author first examines the law of polar sovereignty in the light of the cases concerning acquisition of uninhabited and unacquired territory, and as developed in State practice: in doing so he attacks the 'effective occupation' doctrine as formulated, for example, by Judge Huber in the *Island of Palmas* case. That doctrine 'if indeed it ever existed, survives only in the textbooks' (p. 21). Instead, it is argued, the basic mode of acquisition of territory in these circumstances is consolidation, which may encompass discovery, exploration, symbolic annexation, as well as acts of occupation by governments concerned. The sector principle, on the other hand, is dismissed as a possible root of title (p. 30).

The second part of the book (pp. 45-82) has two main themes—on the one hand the possibility of acquisition of Antarctic territory, and on the other the continuing failure of the New Zealand Government to advance its claims (devolved, apparently, from Great Britain) in any consistent way. Thus 'the Ross Ice Shelf is subject to national appropriation' (that is to say, it was so subject before the Antarctic Treaty 'froze' national claims), by virtue of the presumption in favour of State freedom of action (p. 50), but neither Great Britain nor New Zealand have in fact appropriated it (p. 55). Equally the Ross Dependency itself might have been appropriated by proper action, but neither country ever made out a definitive claim; and the Antarctic Treaty, and New Zealand's technical and logistic reliance upon the United States in Antarctica, seem to preclude any such action now. 'The logical long-term solution', it is suggested, 'would appear to be some form of condominium' (p. 81). In view of the fact that the United States neither claims itself, nor recognizes other claims to, sovereignty in the Antarctic, it is however difficult to see that the situation, as a matter of law, approaches condominium.

The author has an extensive and evident acquaintance with the literature, whether legal, geographic or scientific; and his handling of the topic shows much attention to detail, without however always avoiding repetition. A more important criticism is that it is sometimes difficult, amid the multiplicity of fact and reference, to follow the general argument of the book. With these reservations this is a useful work.

JAMES CRAWFORD

Legal Problems of an Enlarged European Community. Edited by M. E. BATHURST, K. R. SIMMONDS, N. MARCH HUNNINGS and JANE WELCH. British Institute, *Studies in International and Comparative Law*, No. 6. London: Stevens and Sons, 1972. xix + 369 pp (including index) £6.75.

P. DAILLIER *L'Harmonisation des législations douanières des États membres de la Communauté Économique Européenne*. Vol. LXVI, *Bibliothèque de droit international*, Librairie Générale de droit et de jurisprudence. Paris:

Pichon and Durand-Auzias, 1972. 345 pp (including index). No price stated.

Legal Problems of an Enlarged Economic Community results from the Conference organized by the British Institute of International and Comparative Law in Dublin in October 1970. The twenty-nine essays are revised versions of working papers prepared for that Conference.

The book is divided into seven parts, with essays on The Irish Constitution, The Courts, Legislatures, Foreign Relations, Company Laws, Transport and Agriculture. Some of the essays are specifically concerned with the problems of entry of the—then—four applicant States. Thus Eire's need to amend parts of its Constitution to permit entry is discussed in essays by the Irish Prime Minister, Mr. J. Lynch, and Mr. J. Temple Lang on 'The Republic of Ireland and the E.E.C.—the Constitutional Position'. There are also essays on the problems of the dependent territories of the applicants: Dr. H. H. Marshall and Professor K. R. Simmonds write on 'The United Kingdom and the Community: Some problems affecting Dependent territories and Independent States of the Commonwealth' and Mr. C. Boye Jacobsen and Professor T. Opsahl discuss the position of the Danish and Norwegian dependencies respectively. Certain of the essays on Agriculture and Transport fall into the same general category. There is, for example, a study of the Common Market Transport policy and its relation to those of Eire and the United Kingdom by Mr. B. A. McGrath.

But most of the essays are of wider scope, dealing with various aspects of the constitutional and other law of the Communities and the relationship between Common Market law and the law of member States. At a general level, essays within this second category tend to confirm a number of thoughts that have commonly been expressed about the Common Market. Thus several essays—particularly those by Mr. A. Deringer on 'Parliamentary Control of Community Decision Making' and Professor J. D. B. Mitchell on 'Community Legislation'—provide evidence of the scant parliamentary control that exists over executive action and the fact that some seventeenth-century battles may, somewhat unexpectedly, need to be fought again in Brussels if European political union progresses much further. Other essays—namely those by Judge Pescatore on 'The Interpretation of Community Law and the Doctrine of the *Acte Claire*' and Mme Questiaux on 'Interpretation of Community Law'—bring out the delicacy of the relationship between the Communities' Court and national courts. Whatever may be the position of national Parliaments, there is no doubt that the sovereignty of national courts is restricted by Common Market membership. Finally, there is Dr. N. March Hunnings's essay on 'The European Communities and Public International Law' in which the evolution of the Communities towards an international personality that has as much in common with that of a federal State as it has with that of the typical public international organization is clearly shown.

As well as being interesting at this general level, the essays are also extremely useful in terms of the detailed examination of certain aspects of Common Market law that they contain. Undoubtedly, they were well worth putting together in a permanent form. The book is a valuable contribution to the English literature on Common Market law.

L'Harmonisation des législations douanières des États membres de la Communauté Économique Européenne examines in detail the steps taken within European Communities to harmonise the customs laws of member States.

The author brings out the economic and social factors that have shaped the developments so far as well as the problem that stands in the way of any attempt to go further

than harmonization and to establish a Common Market customs system in place of the parallel systems of member States. Here, as in certain other areas of Common Market law at this stage, such a move presupposes a major decision as to the political future of Europe. This is a most useful monograph on a particular aspect of Common Market law of a kind that, with one or two exceptions, has yet to appear in English.

D. J. HARRIS

Human Rights and Europe. By RALPH BEDDARD. London: Sweet & Maxwell 1973. xiii + 104 pp. Hardback £1.80; paperback £0.95.

This book is one of the first in a new *Modern Legal Studies* Series. The ambitious aims of this series, as set out in the general preface, are: to supplement traditional textbooks; to provide, as the series progresses, sets of books as alternatives to comprehensive textbooks; to facilitate the breaking of boundaries between traditional courses; to provide social scientists with undaunting and usable books on the law; and to offer an outlet to legal scholars. It is premature, and in any event outside the scope of this review, to attempt to assess whether this series is achieving all its ambitions. The reviewer will limit himself to the first of the stated aims.

Most teachers of public international law and constitutional law would probably agree with Dr. Beddard that 'The European Convention has now reached a stage of development when it should be the object of study by every law student and by many practitioners' (preface). The authors of standard textbooks on those two subjects are only able to devote a few pages to the European Convention and so there is clearly a need for a short, supplementary book on the subject. This book partly meets that need.

The basic concern of this book, as its subtitle discloses, is the machinery for the protection of human rights in Europe. In Chapter 1 the author discusses the European Convention and the individual and, in the light of the cases, considers the extent to which the Convention has contributed to the quality of life of the European citizen. The next chapter is concerned with the background to the Convention. It gives an informative account of the movement towards and the drafting of the Convention. Chapter 3 deals with the machinery of enforcement set up by the Convention and discusses the respective roles of the European Commission of Human Rights, the Committee of Ministers of the Council of Europe and the European Court of Human Rights.

The next three chapters are concerned with the various restrictions, procedural limitations and other impediments to the rights guaranteed by the Convention. This, in the reviewer's opinion, is the most interesting and successful part of the book. It contains a valuable analysis of the practice of the Commission and the Court, particularly on the important questions of admissibility and exhaustion of local remedies.

Finally, in Chapter 7 the author draws some conclusions concerning the success of the Convention. He demonstrates convincingly that the Convention and the machinery it has set up have been more successful in indirectly influencing the conduct of the signatory States than in bringing benefits to individual petitioners. He rightly urges that the Commission and Court should always seek to raise the minimum standard guaranteed by the Convention and that the time is ripe to consider ways to improve their cumbersome procedures.

Thus far Dr. Beddard's thoughtful and readable book meets the need mentioned earlier. But its one major deficiency, which is freely acknowledged by the author, is the failure to examine the substantive rights in the Convention. This omission appears to be the result of editorial policy concerning the length of the book. Interesting and important as the machinery of the European Convention is, it only becomes really meaningful in the context of the rights which it has been set up to protect. Thus the author's discussion of the standards set by the Convention and the desirability of adding to the list of rights is somewhat artificial when divorced from any consideration of the existing rights. This deficiency is heightened by two other factors. The author quotes from decisions, judgments and other writings, but no references are given (e.g. on pages 35, 48, 52, 60 and 80). This does not appear to be a matter of editorial policy for at least two other books in this series do contain notes at the end of each chapter (Hayton's *Registered Land* and Heydon's *Economic Torts*). It is also unsatisfactory for a book which is intended 'to provide a frame on which teachers, students and lawyers in general can build a more substantial superstructure' (preface) not to provide at least some basic suggestions for further reading.

J. W. BRIDGE

Public International Law. By D. J. LATHAM BROWN. London: Sweet & Maxwell Ltd., 1970. xxx+274 pp. (index, 21 pp), Hardback £2.50, paperback £1.25.

This useful book maintains and indeed surpasses the standard set by other volumes in Sweet & Maxwell's *Concise College Texts* series. It skilfully compresses a great deal of material, readably presented. It does not confine itself to a mere statement of international rules, but illustrates them with a wide range of historical examples. The author frequently states original personal views. It is a very sound and sometimes stimulating introduction to the subject for undergraduates, and could well be used profitably also by those reading for professional examinations or those about to begin government service. The detailed comments which follow should be read in the light of these general views.

Some of the author's statements are striking but bizarre. One example is the suggestion that in 1914 'Austria-Hungary did not commence hostilities with Serbia without good reason and a strong occasion' (p. 65). Mr. Brown concludes his discussion of human rights by saying 'mankind might be still better served by less emphasis on its own imagined dignity and supposed rights, and more stress upon self-reliance and personal responsibility' (p. 176). Surely the very fact that individuals cannot successfully invoke self-reliance against a government or a group of persecutors demands the evolution of doctrines of human rights and the means for ensuring that these rights are not infringed. Mr. Brown condemns British destruction of the Danish fleet in 1801 and the French fleet in 1940, but defends the American blockade of Cuba in 1962 on the ground that the Russians were 'providing the means of endangering the United States' (p. 42). But if danger is the sole test (which is very doubtful), was not the danger to Britain in 1940 at least as great as that to the United States in 1962? The view that India's invasion of Goa was consistent with Portuguese territorial integrity because Portugal is a long way from Goa (p. 82) is questionable. Surely an attack on a colony is as unjustifiable as an attack on the mother country, even without taking into account Portugal's 'metropolitan' doctrine. Sometimes rules of law are stated

dogmatically when they are at least controversial: for example, that treaties designed to impose a regime on third parties do not actually create obligations binding them (p. 24); that 'if . . . States engage in mutual hostilities but maintain their diplomatic links they afford strong, although not conclusive, evidence of the absence of *animus belligerendi*' (p. 40); that 'anticipatory and prophylactic measures may be justified as necessary modes of defence' (p. 41); and that 'if . . . a treaty . . . can be made by force, it can as well be unmade the same way' (p. 47). But there is often at least a grain of truth in some of Mr. Brown's superficially over-extreme statements, such as his view that human rights treaties are too much 'permeated with misleading egalitarian doctrine' (p. 176), and his view that the existence of programmes of economic aid does not entail the existence of a customary rule of law requiring this (p. 64). And he is one of the very few writers at this level to have the courage to state that international law is binding only in honour, 'quasi-law, on the verge of true law' (p. 274).

There are certain points of presentation and arrangement which are perhaps not entirely satisfactory. The style, though generally clear, becomes banal and foggy when general historical and theoretical issues are discussed (see pp. 1-3, 265-6, 270). The text is excessively divided by headings and sub-headings. Mr. Brown's generally lucid prose does not need these signposts, and they tend to impede rather than advance the speed of reading and comprehension. The order of discussion is unorthodox. Mr. Brown justifies this by 'reluctance to mention concepts or institutions before they have been properly introduced' (p. v); but this method entails, to an unusual degree, the discussion of one topic of substantive law being spread over several parts of the book (e.g. acquisition of territory, pp. 109, 198 and 204; protection of aliens, pp. 135, 144, 158 and 191). It is true that there is probably no one desirable order of presentation; on the one hand the subject is unified by a number of underlying doctrines and problems which must appear again and again, and on the other the chunks of substantive law are often autonomous enough to stand by themselves and can be treated in any order. International law, in other words, is a subject into which beginners are best advised to plunge without too much worry about exactly where they start. But it seems odd to deal with matters like the subjects of the law, recognition, sovereign and diplomatic immunity, and the relation of international law to municipal law at the end of the book rather than near the beginning.

A final group of comments concerns omission and emphasis, and these are very tentatively offered in view of the difficulty of satisfying every taste in a concise introduction. There might have been some discussion of global settlements in connection with the satisfaction of international claims; of the 'historic consolidation of title', doctrine regarding the acquisition of territory; of the relation of the denial of justice doctrine to that of the exhaustion of local remedies; and of the 1969 Vienna Convention on the Law of Treaties. This reviewer would have liked to see some discussion of the case law of the European Court of Human Rights, as perhaps the most highly developed example of human rights protection. The phrasing on pp. 122-3 may cause a confusion between the jurisdictional competence of municipal courts to try offenders for crimes committed extra-territorially, and extra-territorial enforcement rights, which raise issues of jurisdiction in another sense. The various bases of competence jurisdiction might be more clearly distinguished. On p. 141 there is a failure to distinguish the question of the illegality before an international court of expropriation in international law from the question whether a municipal court should refuse to declare expropriation unlawful because it adheres to the doctrine that municipal courts should respect the acts of foreign States.

J. D. HEYDON

Principles of Public International Law. By IAN BROWNLIE. 2nd edition. Oxford: Clarendon Press, 1973. xxxvi+733 pp. Hardback, £8.50, paperback £4.

When the first edition of this work appeared in 1966, Professor Baxter, while extending a hearty welcome to it, submitted it to searching and constructive analysis: this *Year Book* 1967, p. 333. Since then the book has become firmly established as one of the leading, most readable and, indeed, peculiarly stimulating textbooks. Academic lawyers as well as practitioners are likely to have experienced the great help they can almost invariably derive from it whenever any question relating to the law of peace occurs. It is, therefore, with great satisfaction that after seven years it is possible to announce the publication of a second edition.

It cannot but contribute to the authority of Dr. Brownlie's writing, for it is thoroughly revised, brought up to date and, although only about ninety pages longer, much expanded. Probably the most substantial addition is Part XI which includes two chapters devoted, respectively, to State succession and other cases of transmission of rights and duties. The latter makes it clear that the learned author, like many others, has great difficulty in explaining the Advisory Opinion on the *International Status of South West Africa* (pp. 653, 654). He rightly states that in 1946 there was no automatic succession by the United Nations to the League of Nations; the statement in the Opinion of 1971 that the United Nations 'is a Successor of the League' in respect of the mandate over South West Africa (paragraph 102) is, therefore, unusually remarkable. But Dr. Brownlie makes the interesting suggestion that 'the principle of necessity may seem to go beyond mere treaty interpretation' (pp. 610, 654). He recognizes that 'in effect' this would be tantamount to 'discovering a case of automatic succession', i.e. something entirely new. This does not, however, signify that the point is unattractive.

Another new chapter is that numbered XXVII dealing with techniques of supervision and protection. Here one will find reference to certain features of modern international life involving reporting, fact-finding, complaints, judicial and other proceedings. A more comprehensive review of the law relating to United Nations peace-keeping forces and their status might well have fitted into this chapter.

The sixteenth chapter, too, is new. It is headed 'Diplomatic and Consular Relations' and deals mainly with diplomatic immunity, a subject which the earlier edition had neglected, but which the Vienna Convention on Diplomatic Relations, ratified by a large number of States, and the Diplomatic Privileges Act 1964 have put on a fairly secure basis.

Among the numerous less extensive changes there are additional sections which have been added to almost every chapter. Three such new sections, for instance, throw further light on the law of State responsibility. They discuss causes of action, control of discretionary powers and ultra-hazardous activities (pp. 460-4). The first of these sections would perhaps have gained from a stricter definition. With reference to the institution of international proceedings Dr. Brownlie suggests that 'the relevant special agreement or application employed to start proceedings should indicate the subject of the dispute and the parties. In the case of proceedings by application the precise issue will be isolated by the tribunal in the light of the pleadings in general and the final submission in particular'. Is the applicant not *required* to state his cause of action? Is he not *required* to plead and prove the facts and submit the law establishing that cause of action? It is a point which, in the absence of precision, can cause great confusion.

In the *Norwegian Loans* case (*I.C.J. Reports*, 1963, p. 15) the French failure until a late stage to consider the question *qualis sit actio* in the sense of international law caused obscurity and should be remembered as a warning. What are the causes of action which international law recognizes? This is a question which it would perhaps be useful to discuss comprehensively and exhaustively. It should be added that Dr. Brownlie remains somewhat sceptical about *abus de droit* (p. 432 and see p. 462), but if this were right the scope of international law would be curtailed in a manner which in practice would be unacceptable. Perhaps the term is unfortunate and should be abandoned. Would it be more satisfactory to develop a duty to take reasonable care of aliens, whether States, corporations or individuals? If this could be done it would have the further advantage that it would be unnecessary to create liability for dangerous activities.

Viewing the book as a whole one is occasionally struck by the author's reticence. Thus on pp. 486, 487 he treats the theory 'that local remedies need not be exhausted unless, at the time of the original harm alleged, the alien has established some voluntary connexion with the territory or jurisdiction of the respondent state'. The conclusion is stated as follows:

As a matter of principle the outcome depends upon one's view of the major basis in policy of the local remedies rule. If the major objective is to provide an alternative, relatively more convenient, recourse to that of proceeding on the international plane then no condition as to a link will apply. If the rule is related to assumption of risk by the alien and the existence of a proper basis for exercise of national jurisdiction, then the requirement of a voluntary link, such as residence, is good sense.

What is Dr. Brownlie's own submission? The absence of an answer is little short of tantalizing.

Even the few remarks here offered on two particular topics are likely to be out of place. The reviewer of a book which is so rich in content, material, instruction and analysis is tempted to select specific points in which he happens to be interested, and to embark upon a unilateral colloquy to which the author cannot reply. To write such a review is a pleasure, but it fails to convey the tribute and the welcome which so outstanding a work as Dr. Brownlie's deserves and is intended to be given. It is fairer, therefore, to conclude with the renewed recommendation of a textbook which is entitled to great respect and which will earn the gratitude of all international lawyers.

F. A. MANN

Basic Documents in International Law. Edited by IAN BROWNLIE. 2nd edition. Oxford: Clarendon Press, 1972. x+284 pp. Hardback £2.50, paperback £1.25.

The main value of this useful collection of international instruments is its conciseness. Dr. Brownlie, the editor, was right in not attempting to include judicial decisions or excerpts therefrom as they could hardly be fitted into a volume of reasonable size. Through the *Basic Documents* the reader obtains a fair picture of the more important part of treaty law governing the peacetime relations of States. In addition there are four declarations and one other resolution adopted by the General Assembly of the United Nations. On p. 116 the reader is rightly warned that he should not attach to them the same legal effects that must be ascribed to treaties. Perhaps this relevant information could be indicated in an earlier passage, e.g. in the Preface or when the first resolution

appears (p. 32); a reference at the beginning of the note relating to any subsequent resolution would then suffice, while a reader less conversant with international law-making would thus be protected from the fallacy of treating resolutions on a par with treaties.

The collection is divided into eight parts: organizations, law of the sea, outer space, diplomatic relations, permanent sovereignty over natural resources, human rights and self-determination, law of treaties, and judicial settlement of disputes. One may wonder whether outer space deserved a separate part (p. 116). Though spectacular, exploration and use of outer space is a marginal activity compared to everyday transactions and preoccupations of States in other domains. Some of the recent conventions on air law are more important, and the Treaty on Outer Space could perhaps be linked with the law of the sea to form one part as in some respects the two spheres are not dissimilar. There is even less justification for a separate part on natural resources (p. 140), especially as the only instrument here printed is the debatable Resolution 1803 (XVII). It can easily (and logically) be joined to the Declaration on Friendly Relations (p. 32).

Almost every instrument is preceded by a bibliographical note. They are helpful, and the more diligent students must feel grateful to the editor for giving them a hand. But references to textbooks or manuals seem superfluous.

The exclusion of the Statute of the International Law Commission is to be regretted. Perhaps excerpts from it could be restored under the heading of international organizations. With the British entry into the European Communities it will become rather fortuitous to present regional co-operation through the African example alone (p. 68). Probably a part on integration as an international legal phenomenon will have to be added to the next edition unless Dr. Brownlie intends to prepare a separate volume on that subject.

The second edition of the *Basic Documents* is a welcome tool in the teaching and study of the law of peace.

K. SKUBISZEWSKI

The Genesis of Bangladesh. By SUBRATA ROY CHOWDHURY. London: Asia Publishing House, 1972. xii + 345 pp. £4.00.

In 1947 there appeared on the Indian subcontinent two sovereign States, India and Pakistan. India remained one unit. Pakistan, however, consisted of two sections, the Eastern and Western parts which were separated from each other by some 1,200 miles of Indian territory and in addition the Bengali culture and language gave to East Pakistan a homogeneity and a concomitant feeling of separateness from the rest of Pakistan. It was such factors which led Hans J. Morgenthau to observe in 1956 that: 'Pakistan is not a nation and hardly a State. It has no justification in history, ethnic origin, language, civilization, or the consciousness of those who make up its population' (cited on p. 7 of Mr. Chowdhury's work). The emergence of the new State of Bangladesh in 1971 confirmed, if confirmation was needed, the truth of this observation. In his book, *The Genesis of Bangladesh*, Mr. Chowdhury gives a quite vivid account of the events which led to the appearance of the new State of Bangladesh and also makes some interesting observations on some of the relevant international legal issues.

At the heart of the matter lay the simple fact that East Pakistan saw itself as a 'colony' of West Pakistan and a victim of all types of discrimination—political, cultural,

economic and administrative. However, it was the attempt by the Bengali political party, the Awami League under its leader Sheik Mujibar Rahman, the present President of Bangladesh, to secure more autonomy within the State of Pakistan which triggered off the events which led to the fragmentation of Pakistan and the emergence of Bangladesh. The Awami League fought the national elections of December 1970 on a 'six-point programme for autonomy' and won the majority of seats in the National Assembly. The then President of Pakistan, General Yahya, decided to postpone the inaugural session of the National Assembly. In response the Awami League launched a policy of non-violent non-cooperation with the regime. It was not long before President Yahya unleashed a campaign of terror in order to suppress dissidence in East Pakistan and preserve the integrity of the State of Pakistan. The armed conflict which began in March 1971 ended, after India's intervention, with the appearance of the new State of Bangladesh.

In a chapter bearing the rubric, 'Crimes of a soulless regime,' the author has put together an astonishing list of atrocities perpetrated by the West Pakistani troops and has submitted cogent arguments to show that President Yahya's troops had in fact committed war crimes and crimes against humanity, in particular the crime of genocide. However, the Delhi Accord of 28 August 1973 has reduced to a certain extent the immediate relevance of this section of the book by providing for the repatriation of the vast majority of the West Pakistani prisoners of war held in India. Moreover it is likely that a political rather than a judicial solution will be found to settle the fate of the 195 West Pakistani prisoners who are still being held (see Chapter VII of the Accord).

One of the important issues raised in this work concerns the principle or, as some, including Mr. Chowdhury himself, would prefer to call it, the right of self-determination. The author declares that 'the principle that the right of self-determination does not permit dismemberment of a country, is available only to a government which derives its authority from the will of the people expressed through periodic and genuine elections'. In other words there is no room for the operation of the 'right of self-determination', where there is a democratic form of government, which is in theory an eminently attractive proposition. How effective can it be in practice? In the first place, given that democracy is such a *rara avis* in the contemporary world, to identify the 'right of self-determination' with the democratic process is possibly not a very useful criterion. Secondly, once emancipated from European rule, the ex-colonial States of the Third World which are particularly in point here, have quite clearly and emphatically given pride of place to the principle of territorial integrity rather than to 'the right of self-determination' (see, for example, Article 2 of the O.A.U. Charter). This concern for the principle of territorial integrity may serve to explain why the United Nations maintained its 'conspicuous silence' during the Bangladesh crisis—an attitude which Mr. Chowdhury has severely criticized. The importance of the conflict between the principle of territorial integrity and 'the right of self-determination' ought to have led the author to have examined in much greater depth the reasons for the United Nations' apparent indifference to the Bangladesh crisis.

The author claims that the military junta which took power in Pakistan in 1958 was not a 'legitimate government' and therefore was not entitled to 'continued recognition'. It was not legitimate because it did not enjoy popular consent. According to the author, 'such a junta could not claim democratic legitimacy which is the foundation of the contemporary law of recognition'. State practice certainly does not support this proposition. Mr. Chowdhury would submit that there is a distinction between the validity and the efficacy of legal norms. It can be argued, however, that when in

international law the gap between the so-called legal norms and State practice becomes too divergent, it is more than likely that such a norm does not constitute part of international law.

This book offers a good factual description of the manner in which a new State emerged from the fragmentation of an ex-colonial State—a phenomenon which may yet be repeated. In this reviewer's opinion the author in his observations on some of the relevant international legal issues seems to blur the distinction between *lex lata* and *lex ferenda*.

L. D. M. NELSON

The Concept of State Jurisdiction in International Space Law. By I. A. CSABAFI. The Hague: Martinus Nijhoff, 1971. xxvii and 197 pp. Gld. 27.

To a great extent the law of outer space is still embryonic and the recent concern as to the possible necessity of rescuing astronauts whose 'skylabs' have developed faults, together with problems concerning collisions in space, interference with the free use of space and, with the lengthening of the period that astronauts are expected to remain in space, the potential for criminal and other activities in which the law may be interested, all serve to emphasize the significance of *The Concept of State Jurisdiction in International Space Law*. While it is true that the number of conventions establishing space law is somewhat limited, there have already been numerous resolutions of the United Nations as well as debates of learned societies and international bodies which have contributed to an atmosphere and perhaps even trends which may ultimately have an influence on the *lex lata*. It is, however, submitted that Dr. Csabafi places too much weight on the legal significance and law-creative potential of such material (Ch. I and pp. 100 et seq.), and it is interesting to note that Dr. Goedhuis in his introduction to the monograph points out that in view of the reservations raised by various delegations 'it is possible to disagree with the author on the bindingness of all the principles of the Declaration' on Legal Principles adopted by the General Assembly in 1962 (pp. xxi-xxiii).

Dr. Csabafi regards Article VIII of the 1967 Space Treaty—'A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any person thereof, while in outer space or on a celestial body . . . '—as providing a general rule only, still leaving the way for 'the clarification and systematization of legal rules governing the exercise of State jurisdiction over persons, things, occurrences and events in outer space' (p. 3), and his study is a contribution to this clarification and systematization. It is perhaps worth mentioning in this connection that in his *Law in Outer Space*, Judge Lachs infers that the impact of the Treaty is somewhat wider (pp. 71-2), a view that tends to be supported by Dr. Kish in his *Law of International Spaces* (p. 131).

This work largely constitutes an account of the development of space law up to and including the adoption of the Space Treaty and the agreement on the Rescue of Astronauts, both of 1967 (the Preface is dated 1969), and perhaps the most valuable section of the study is Chapter 5, which is devoted to 'Observations *De Lege Ferenda*'. Of these, it may well be that the most important are the author's proposals concerning 'functional jurisdiction', which to some extent derive from the fact that treaty law expressly rejects the possibility of sovereignty in outer space (p. 130). He defines this concept as 'the right of a State in international law to regulate rights of persons, to affect

property, things, events and occurrences in designated zones in outer space or areas on celestial bodies, whether by legislative, executive or judicial measures to the extent necessary to safeguard and secure its right to explore and exploit outer space including celestial bodies . . . [C]laims to this kind of State jurisdiction must be founded on the requirements of and contained by the inherent nature of a specific activity. . . . The right to exercise functional jurisdiction ceases to exist when activity is halted or when the cause is consummated or the link . . . between the physical element and the activity of the claimant . . . breaks up' (p. 131). In order to explain the practical significance of this type of jurisdiction in so far as space law is concerned, Dr. Csabafi analyses Canadian policy with regard to Telesat and parking spaces (pp. 138-50).

It is clear from the author's concept of functional jurisdiction and the manner in which he approaches it against the background of the relevant treaties and United Nations practice, that he considers operations within this sphere as subject primarily to the law of the United Nations and the general rules of international law, supplemented as may be necessary to meet the special needs of space. His monograph serves as a useful introduction to the phenomenon of space law. It is unfortunate, therefore, that while Dr. Csabafi provides a useful bibliography and collection of significant documents, his table of cases is virtually valueless, for, regardless of the misprints, there is no indication of the page at which any of his more than 70 cases is discussed.

L. C. GREEN

The International Air Transport Association. By RICHARD Y. CHUANG. Leyden: A. W. Sijthoff, 1972. 185 pp. Fl. 35.

International organizations in the field of communication deal either with technical or commercial aspects of world transport problems. I.M.C.O. and I.C.A.O. deal with technical problems; I.A.T.A. an association of international airlines, carries out rate-recommending functions in the field of civil aviation. The author gives an excellent account of I.A.T.A.'s origin, structure and functions. I.A.T.A. is formally a Canadian corporation but the governments of carrier members stand behind its traffic conference machinery. The author pays special attention to closed and open rate situations within I.A.T.A., the latter resulting from disagreement between members of Traffic Conferences, and he adds that in practice 'the consequences of open rates have never become very serious'. If it were otherwise, world civil aviation could suffer from a disastrous cut-throat competition between the leading airlines. The greatest number of reservations to I.A.T.A. resolutions were made by the United States and Canada. Here the author states that 'both countries, and particularly the U.S., protect the public better than any other country'. The American C.A.B. has repeatedly expressed its dissatisfaction with I.A.T.A. since the latter 'has not done its best to reduce fares in the interest of the travelling public'. On the other hand the weaker aviation countries regarded I.A.T.A. as an agency protecting them from the competition of the powerful aviation countries. In this kind of book a good deal of para-legal ground has to be cleared to arrive at the examination of strictly legal problems. The author inquires into the legal nature of I.A.T.A. in a comparative way, particularly against the background of public corporations and mixed enterprises and he engages in an analysis and reappraisal of the theory of public corporations, relying to a great extent on the views of the late Professor Wolfgang Friedmann. With the exception of United States carriers most of the international airlines are entirely or partly owned by governments. Thus I.A.T.A. is in fact 'a sounding board of most governments' and more than 95 per cent

of all resolutions of the Traffic Conferences are approved by the governments concerned. The author concludes that I.A.T.A. cannot be considered a purely private international organization but must be classified as an agency *sui generis*.

CHARLES HENRY ALEXANDROWICZ

The Concept of Custom in International Law. By ANTHONY A. D'AMATO. Ithaca and London: Cornell University Press, 1971. xvi+286 pp. £4.55.

Professor D'Amato's work deals with a very fundamental aspect of international law—the nature of international customary law—and it represents an important contribution to the literature on the subject. The book is divided into four parts. The first part describes the 'setting' in which custom operates. The second part is concerned with the author's theory of custom. Therein the writer has made a comprehensive examination of previous writings on the subject and having, as it were, found them wanting, has submitted his own theory of custom in international law. The third part attempts to answer the question why custom seems invested with authority and the final section is entitled 'special problems' and deals, *inter alia*, with the problem of special custom in international law.

The author's thesis is based quite firmly on the 'claim-oriented approach' to international law. The law is viewed simply as 'a psychological bargaining mechanism involving conflicting claims among national decision-makers and their legal counsels' or more tersely as a 'process by which the better of two conflicting claims prevails'. Professor D'Amato's theory itself is starkly simple: there are two ingredients of an international custom—the articulation of a legal claim and its enforcement by an act (or omission) by the claimant State. As soon as a claim is articulated (that is, it has been 'claimed to be a matter of legal regulation and not simply of social habit or political expediency'), and this articulation is enforced by an act or commitment, a custom is born. Articulation is referred to as the qualitative element, whereas the act or commitment provides the quantitative element. As to the latter, the author insistently makes the point, in true Llewellyn fashion, that what is significant is not the views of States as to what the law is but their acts.

Professor D'Amato has, also, made an interesting application to international law of Hart's notion of primary and secondary rules. The primary rules are the 'operative rules of international law'. The secondary rules are the set of arguments by which one State attempts to persuade another about the validity of a rule of international law. Since, to the author, custom is in the end simply a mode of argumentation, it is a secondary rule *par excellence*. Professor D'Amato's adoption of Hart's methodology has some significant consequences for the process of international law-formation. Notions of consent and absence of protests (incidentally he has some very useful observations to make on the role of protests in international law) are only relevant to the secondary rules—the commonly accepted method of argumentation (p. 198). According to his theory their role in the creation of the primary rules is of very limited significance. He is prepared to concede, however, that consent and absence of protests play an important part in the creation of special custom and thereby he creates a fundamental distinction between special custom and what he terms general custom.

His thesis leads the author into a daring restatement of the relationship between treaties and custom. Treaties are considered simply as 'acts' of States—the quantitative element in the formation of an international law custom. Thus treaties or at least 'the generalizable provisions' of treaties do not 'harden' or 'ripen' into international customary

law; they are, in fact, the customs of the law of nations. Indeed he baldly declares: 'If treaties do at any point in time pass into customary law, they pass at the moment they are ratified' (p. 164).

Professor D'Amato's exegesis, perhaps in common with other claim-oriented approaches, minimizes the role of third-party adjudication (be it judicial settlement or arbitration) in international law (p. 9). The present reviewer submits that, in spite of the fact that far from enough *use* is made of third-party adjudication in present-day international relations, the court-oriented approach with its concomitant concern with the norms of international law is still of supreme relevance, since legal advisers in the majority of cases think in terms of a judicial tribunal when formulating their opinions. They cannot help but operate in this manner. Moreover, when it is recalled that since the Hague Peace Conferences of 1899 and 1907 one of the major objectives of the international community has been the establishment and strengthening of the process of third party adjudication, one cannot help but feel that, in a real sense, this so-called 'relativistic' approach seems to fly in the face of this development.

Looked at within the classic exposition of international law, the observation of the author, that treaties constitute international customary law as soon as ratified, would constitute a very bold assertion indeed, and one which would certainly amount to a frontal attack on the *res inter alios acta* doctrine in the law of treaties, a doctrine which the Court in the recent *North Sea Continental Shelf* cases specifically reaffirmed when it stated *inter alia*: . . . 'it is not lightly to be presumed that a State which has not carried out these formalities (ratification, accession, etc.), though at times fully able and entitled to do so, has nevertheless somehow become bound in another way' (*North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, p. 25). However, his thesis concerning the custom-creating effects of treaties becomes less alarming, when placed within his definition of custom for it becomes *tout court* another weapon in the game of persuasion.

Factors such as consent, estoppel and reasonableness are considered merely as reinforcing factors and are not what he terms 'basic factors'. They can strengthen a custom but they have no motivating influence in the sense that they cannot create a custom. Assertions such as 'custom reflecting the felt needs of the community' receive very short shrift indeed. It is curious that Professor D'Amato is very careful to underrate the role of power in the creation of the norms of customary law, when his whole approach seems, in this reviewer's opinion, peculiarly vulnerable to such considerations.

This work is a challenging attempt to accommodate change in international society and to provide a theory on the formation of custom in a claim-conflict *ambiance* where, in fact, little use is, or possibly can be made, of either the arbitral or judicial process. The thesis is generally amply supported by illustrations. Nevertheless, it is certainly not a definitive exposition of this important area of international law. No doubt the truth is that the creation of international customary law cannot be reduced to that kind of simple formula.

L. D. M. NELSON

Voting and Decisions in the International Monetary Fund. By JOSEPH GOLD. International Monetary Fund, Washington D.C., 1972. xii+368 pp. (including appendices and indices). \$6.50.

It is well known that the International Monetary Fund, unlike most other international organizations, operates a system of weighted voting. Few, however, are

familiar with the manifold intricacies of the system, including the provisions for adjustable voting power, reserved powers and special majorities (four kinds plus unanimity), as well as a variety of unwritten conventions. To these and related aspects of the decision-making process Mr. Gold, who draws on over a quarter of a century's experience of the Legal Department of the Fund and on thirteen years as Director of that Department and General Counsel of the Fund, is a most helpful and authoritative guide. His exposition is never less than thorough and accurate, and if it is sometimes heavy going, the complexity of the subject-matter is to blame.

Full though the treatment of the subject is, much of importance has been left unsaid. For example, despite the complexity of the voting rules, it is one of the striking features of the Fund that formal votes are hardly ever taken, the Executive Directors preferring to go by 'the sense of the meeting'. The author informs us of this, but offers no really satisfying explanation. Furthermore, there is virtually no account of the interaction between political and economic power on the one hand, and the voting machinery, which does not cease to be influential though it is seldom put into operation, on the other. Mr. Gold is of course entitled to reply that he is not a political scientist, and that his official position in the Fund justifies a certain reticence. The fact remains, however, that no description of the decision-making process can be complete without an account of how the political forces work through, and on, the constitutional rules. For such an account, it will be necessary to look elsewhere; on the legal aspects, however, we now have the definitive study, at least until the rules are changed again.

MAURICE MENDELSON

Cases and Materials on International Law. By D. J. HARRIS. London: Sweet & Maxwell, 1973. xxviii+728 pp. (appendices and index, 51 pp). Paperback £5.75. Hardback copies available later.

As its name implies, this book is more than a casebook. The materials which it contains have been drawn from every conceivable source of international law; the author is obviously extremely well read. He adds brief but thought-provoking comments and questions of his own. The book follows what is already becoming an orthodox pattern by dealing with *ius ad bellum*, but not *ius in bello*. More surprisingly, there is no chapter on the United Nations, although several aspects of the United Nations are dealt with in other chapters. There are also a number of short passages here and there on the E.E.C. and other international organizations. The author shows considerable awareness of the political background of international law, and he knows how to attract a student's interest by dealing with topical questions such as pollution and nuclear tests.

This is a book which will be invaluable to postgraduate students (and to their teachers—your reviewer is not ashamed to admit that he learned several things from this book which he had not known before). Whether it is suitable for undergraduates is another matter. The book throws the reader in at the deep end and hopes that he will swim; things are not *explained* in a coherent *order*. The book also sometimes spotlights particular problems at the expense of others; for instance, the section on custom starts with an eleven-page quotation from the *North Sea Continental Shelf* cases on the relationship between treaties and custom, which is a rather specialized aspect of customary international law. These remarks are not intended in a hostile spirit: such

features are probably inherent in the very nature of a casebook (or cases and materials book).

There are, however, one or two blemishes which could have been avoided. The inclusion of a chapter on arbitration and judicial settlement, coupled with the omission of any reference to other methods of peaceful settlement, gives a very misleading idea of how disputes between States are settled in practice. The book is weak on the theory of international law (natural law, positivism, Marxism, etc.). The 1935 Harvard Draft Convention is quoted on p. 236 as laying down the rule *ne bis in idem* as a rule of international law, without any reference to the many recent cases refusing to apply it to foreign convictions and acquittals. The history of the Stimson doctrine is traced up to 1950—and no further. But these are minor defects, which can presumably be cured when the book goes into its second edition; for there can be no doubt that this is a book which deserves to run into several editions.

MICHAEL AKEHURST

The International Legal System. Cases and Materials. With Emphasis on the Australian Perspective. By W. E. HOLDER and G. A. BRENNAN. Sydney: Butterworths, 1972. xi+1048 pp. (including appendices and index), Hardback £13.20, paperback £10.

With this work Mr. Holder and Mr. Brennan have satisfied the need for an up-to-date collection of cases and materials on international law. The framework of their approach is the policy-oriented jurisprudence of Professor McDougal. Thus the major sections of the book examine the nature of international law, participation in international society, bases of power (territory, resources and people), jurisdiction, liability of States (torts, and international business transactions), strategies (treaties, diplomacy, coercion) and the peaceful settlement of disputes. The four appendices contain the United Nations Charter and Statute of the International Court of Justice, and tables detailing Australia's participation in United Nations agencies, national claims to territorial waters and fisheries, and the composition of the International Court of Justice between 1946 and 1971.

The materials included are relevant and up to date (though on page 272 the authors have apparently overlooked the fact that China is now represented in the United Nations by the Peking government). Maps and diagrams, so often infuriatingly inadequate in books on international law, are here skilfully used.

The reader is not distracted by the Australian material which is only a small proportion of the whole and indeed enhances the volume by providing necessary examples of State practice. The materials on Australian recognition and trusteeship practice in Chapter 5 are particularly interesting.

The flavour of the volume is perhaps best conveyed by detailing the contents of the chapter (of twenty-two pages) on the Continental Shelf. A half-page introduction by the authors explains, with the aid of a diagram, what the geographical continental shelf is. This is followed by the text of the Geneva Convention on the Continental Shelf (Articles 1 to 6 and Article 12), a single-page extract from McDougal and Burke's *The Public Order of the Oceans*, part of the text of the Truman Proclamation, and an authors' note on the impact of the Proclamation. A five-page extract from the decision in the *North Sea Continental Shelf* cases (illustrated with a map) is followed by a note on the final settlement of the dispute with another map. An extract from O'Connell's

International Law and another authors' note discuss the concept of exploitability and the activities of the United Nations Seabed Committee. Turning to Australian practice, the Australian Proclamation of 10 September 1953 is followed by another authors' note, extracts from Parliamentary speeches by the Australian Minister for External Affairs and Attorney-General, a map of Australian claims to the shelf, an extract from a law review article, and two more short authors' notes, one on the internal allocation of shelf resources in a federal State. A final brief authors' comment draws attention to the forthcoming Conference on the Law of the Sea.

The authors' notes, though rather short, are usually accurate and helpful: exceptions are the unhappy venture into legal theory in the note on page 34 where there is some confusion between analytical jurisprudence and social psychology, and the remarks on pages 23 and 213 which seem to betray a misunderstanding of the notion of the legal equality of States.

In general the choice of material achieves the avowed aim of presenting the law in its political context. As well as extracts from British and Australian Parliamentary proceedings there is material from the International Law Commission, Security Council debates and resolutions as well as, of course, General Assembly recommendations. Welcome innovations are chapters on negotiation and diplomacy and 'transnational' groups as participants in the international system. This realistic approach to international law is, however, subject to one or two lapses. The brief space accorded to executive decision as a means of implementing international law is inadequate. There is no discussion of how States decide whether to use international judicial procedures, the disappointingly facile conclusion being that more confidence in the Court is required (page 24). The acute problems of policy surrounding formulation of the Vienna Convention provisions on the invalidity and termination of treaty obligations are insufficiently brought out and the authors have little to contribute to the debate on treaty interpretation.

Of course some limitations are imposed by the form the authors have chosen. Chapter One attempts a rapid survey of contemporary international society including the impact of technology, new States, Communist practice and the sociology of international law. This is essentially a background chapter which the authors would have been wise to write themselves. One-page extracts from eleven writers on six different subjects are hardly a firm enough foundation for what follows. Moreover, by use of the extracts method in the last chapter the authors' undue modesty deprives the reader of a coherent conclusion.

There are also important topics to which the cases and materials approach is rather ill suited. The reader is struck by the sheer inefficiency of attempting to study the law of treaties or diplomatic immunity without having the full text of the Vienna Conventions to hand. Article by article commentary by many different writers, with some articles omitted and others out of order, can be both confusing and misleading. Again, the extracts method is not well fitted to conveying complex or esoteric arguments. Professor McDougal, as might be expected, is a particular sufferer here. International judicial decisions raise the same problem. Seven pages from the *Expenses* Opinion and one page from the 1966 *South West Africa* decision can scarcely be very illuminating, whilst even the five pages from the less difficult *North Sea Continental Shelf* cases hardly provide more than a sketch of the decision, though a cross-reference to the earlier chapter on custom would have done something to put the issues in perspective.

A fair reply might be that a work of this kind can only provide an outline and the reader can seek more detail elsewhere. But this is not an answer to the objection that

some extracts are so brief as to be almost worthless (as with some of the extracts from McDougal). Moreover, the authors have clearly sought to keep footnotes to a minimum and in doing so have made further research difficult. In the chapter on recognition, for example, there is no reference at all to the literature on the *Zeiss* or *Al-Fin* cases (the latter is also wrongly spelt) and there is no suggestion that these decisions are in any way controversial. Likewise, the summary of Professor McDougal's theory on page 37 must be considered incomplete without some reference to the reservations which many have recently voiced.

Whilst this is, therefore, an important book, its value will depend on how it is used. It provides the student with a useful collection of primary sources and conveys a broad and realistic picture of international law seen through the eyes of leading commentators. Its shortcomings, such as they are, are to a degree inevitable in a work of this kind. Suitably supplemented, it will surely have an important role to play in international law teaching for many years to come.

J. G. MERRILLS

The Extent of the Advisory Jurisdiction of the International Court of Justice.
By KENNETH JAMES KEITH. Leyden: A. W. Sijthoff, 1971. 271 pp. Fl. 40.

The principal subject of this study is precisely identified by its title: 'The *Extent* of the Advisory Jurisdiction of the International Court of Justice'. In four central chapters the author discusses first the 'advisory competence' of the Court, i.e. the circumstances under which it has *authority* to reply to questions addressed to it, depending on the authority of the requesting organ to submit questions, the organ's substantive competence, its compliance with the procedural requirements of its own constitution as well as of the Statute of the Court, the nature of the question, and possibly the consent of any State party to a dispute to which the question relates; and second the *discretion* that the Court has, to reply or not, consequent on its status as a principal organ of the United Nations, on its status as a judicial organ and on miscellaneous considerations (the political nature of the question, availability of other disputes procedures, interference in the interpretation of a treaty, the possible value of the requested opinion, etc.).

This is therefore not a complete analysis of all aspects of the World Court acting as an advisory body. Thus questions of procedure are dealt with only incidentally, if they shed light on a jurisdictional question (e.g. the possibility that the Court might decline to reply to a question if its procedures would not permit it to treat all directly interested parties equally, or would not assure it of obtaining all the relevant arguments and facts). Similarly, the substance of the questions heretofore submitted and of the opinions rendered are mentioned only in so far as relevant to some aspect of the Court's decision to reply. However, two interrelated but only tenuously relevant subjects are covered at some length: the value as precedents of decisions of the Court and its predecessor and the authority of the advisory opinions, both in theory and practice.

The author's treatment of each segment of his subject is most detailed, comprising analyses of the relevant opinions and dissents, of the reactions of the requesting organ, any affected parties and outside commentators, and of the conformity of subsequent opinions. The presentation is case-oriented, with legislative history receiving somewhat short shrift.

Of particular interest are certain novel arguments which depart considerably from conventional learning. Perhaps the most striking of these theses (and by the length of

the exposition one may suspect that this discovery was the germ of the entire study), is the suggestion that the *Eastern Carelia*¹ case does not stand for the proposition that the Permanent Court lacked competence to render an opinion that would resolve a pending dispute among States if one of these refused to participate in the proceeding, but rather that the Court had merely held the League Council to be incompetent² to consider and submit the question by reason of the non-participation in *its* proceedings of the Soviet Union, then still a non-member of the League. The assertion that Article 59 of the I.C.J. Statute was not designed to negate the effect as precedents of decisions of the Court, but rather only defines the binding effects of judgments with respect to intervening parties and non-parties, is not novel but bears repetition. On the other hand, the argument that certain non-specialized agencies that have submitted to the I.L.O. Administrative Tribunal might, in spite of the restrictive language of Article 96 (2) of the United Nations Charter and the lack of General Assembly authorization, use Article XII of the Tribunal's Statute to appeal to the World Court on the ground that that Statute is a treaty or convention in force (cf. I.C.J. Statute, Article 36 (1)) is ingenious but unconvincing. Similarly, some of the explanations proffered to disguise failures of organs and States to comply with certain opinions of the Court appear disingenuous and politically unrealistic. Finally, in some respects—for example the question whether individuals involved in advisory proceedings might be represented in oral hearings—the author has perhaps too easily accepted that this cannot be done and is content to draw the consequences therefrom, instead of exploring possible positive solutions.

Some weaknesses in the study may reflect its origins as a thesis: the arguments appear to be addressed to a professor basically familiar with the subject matter and interested in evaluating the research on and the persuasive exposition of certain points. For the unburdened reader a proper introduction, consisting perhaps of a chronological sketch tracing the development of various relevant legislative provisions (Article 14 of the Covenant, provisions of the 1920, 1929 and 1945 Court Statutes, Article 96 of the Charter, as well as the relevant Rules) and listing the opinions rendered at various stages, would have been most helpful. So also would have been a clearer presentation of the titles and headings illuminating the sub-structure of the arguments.

While therefore probably of limited use to a lay reader unfamiliar with the World Court, Mr. Keith's study does constitute a valuable addition to the analytical literature on the Court, in which those dealing with advisory opinions, from a practical or a scholarly point of view, will be able to find full discussions of most³ significant jurisdictional questions as well as some new insights that might assist in gradually enhancing the advisory competence.

PAUL C. SZASZ

¹ *Status of Eastern Carelia*, Advisory Opinion, *P.C.I.J.*, 1923, Series B, No. 5.

² By reason of Article 17 of the Covenant—a provision that reappears only in much less restrictive form in Articles 32 and 35 (2) of the U.N. Charter.

³ Unfortunately the book was completed before the Court rendered its two latest opinions: the *Namibia* case (*I.C.J. Reports*, 1971, p. 16), and the *Review of Administrative Tribunal Judgment* No. 158 (*I.C.J. Reports*, 1973, p. 166), which resolve a number of points on which Mr. Keith could only speculate—while presenting new ones which he could have developed.

La Communauté Économique Européenne dans les Relations Commerciales Internationales. By CAE-ONE KIM. Brussels: Presses Universitaires de Bruxelles, 1971. xi+549 pp. F.B. 550.

The author carries out an examination of the antecedents of the trend towards European economic integration which resulted in the creation of the European Economic Community (E.E.C.). While commercial policy had been in the past a national monopoly, the Treaty of Rome, for the first time in the history of mankind, substituted a supranational organization in place of national solutions. The author is particularly concerned with the external powers of E.E.C. and discusses its prerogative of participation in international commercial agreements. Here the question arises of how can the Community reconcile its policy of total internal liberalization with the requirements of an external non-discriminatory policy aiming at economic expansion on a world-wide scale. The author inquires into the possibilities of co-operation of E.E.C. with G.A.T.T., which is a potentially global arrangement though not one enjoying universal membership. He then examines the preferential arrangements made by the Community with certain countries which constitute an exception to the regime of most-favoured-nation treatment provided by G.A.T.T. The result of the author's investigation is an interesting account of the achievements of the Community in all fields assigned to it by the Treaty of Rome, with particular reference to commercial agreements (bilateral and multilateral) concluded by E.E.C. and to relations with the Contracting Parties of G.A.T.T. At the end of the book are a number of Appendices giving the text of certain provisions of the Treaty of Rome and G.A.T.T. and of E.E.C. statistics.

CHARLES HENRY ALEXANDROWICZ

The Law of Outer Space. By MANFRED LACHS. Leyden: A. W. Sijthoff, 1972. viii+196 pp. Fl. 30.

It is with some diffidence that one undertakes to review a book written by the President of the International Court of Justice. This is especially so when he is such a distinguished scholar as Judge Lachs who has played such an outstanding part in the very development of the law of outer space about which he is writing. Fortunately, there is no difficulty in giving an appreciation of this book worthy of the eminence of its author. It is a most valuable contribution to the literature on the law of outer space which in the past has tended to be too diffuse, too speculative and perhaps unduly critical.

Judge Lachs has set out, as he says in the foreword, to give no more than 'a brief account of the first developments in law-making for outer space'. He disclaims any greater ambitions than to recapitulate events and indicate the trends. This he certainly does with skill and clarity. The introduction to the book gives a thumb-nail sketch of scientific developments, which is in itself a classic of condensation and practical presentation. The exposition of the law begins with the extension to outer space of international law and the United Nations Charter and passes smoothly to the development of the law of outer space through international co-operation. The treatment then turns to the main provisions of the three principal treaties (the texts of which are annexed), but this is done in a systematic fashion which puts the provisions into order and perspective. Problems such as the frontiers of outer space and the meaning of 'peaceful purposes' are analysed in context and with penetration. There is also a useful

select bibliography and a table of cases but, alas, no index. Special mention must be made of the footnotes which not only contain a rich source of references but also provide valuable and readable additions to the text.

Another feature of this book that should be noted is the recognition of the need for lawyers and all those who may contribute to the growth of international law to be well informed on the scientific and technical aspects of their subjects and to work with the help of the experts. The idea that an international lawyer can build his own self-contained system, if it ever was sound, is now a myth that should be abandoned. The emphasis on this point alone gives this book value beyond that of the summary of the law for outer space and its development which is the author's primary objective.

These are the practical features of the book, but, apart from the point just mentioned, it does much more than provide a legal summary. There is an underlying theme and attitude with respect to the fundamental problems of the relation between treaties and international law and the contribution of treaties and General Assembly resolutions to its development. The legal propositions outlined by Judge Lachs are presented so as to suggest that the principles and rules in the 'Space Treaty' and the Agreement on Rescue and Return of Astronauts, etc. now form part of customary international law, while those contained in the more recent 'Convention on International Liability for Damage Caused by Space Objects' are *lex specialis* and are not to be so regarded. Yet, even here, there is a tendency to speak of the treaty rules as 'the law'.

The whole presentation stems from a basic proposition which regards the United Nations Charter as international law *erga omnes*. This in itself is a difficult proposition which in a way the author himself recognizes because he acknowledges that there are certain rules in the Charter which are clearly rules governing the rights and obligations of members as such and are not rules of general international law. Many international lawyers may prefer to adhere to the more orthodox view that the provisions of a treaty are binding only as between the parties to the treaty and that in general a treaty does not create obligations for a third State without its consent. This, broadly speaking, is the approach adopted by the great majority of States in the Vienna Convention on the Law of Treaties, 1969. It may be a position that the author himself would readily accept, while maintaining that because of State practice and general consent the principles of the United Nations Charter have, independently of the instrument itself, become part of customary law. The question may be one of tendency or emphasis and presentation, although the issue is fundamental.

The tendency of Judge Lachs is to present the whole of his exposé as if he were speaking of rules of law, and if the reader is not careful he will be led into thinking that they are all rules of law binding *erga omnes*. I would venture to suggest that anyone reading this book should throughout ask himself the question: is this a rule of customary international law or is it a rule of treaty law? It may be that all the rules stated in the Space Treaty can reasonably be regarded as having become part of customary law, but this is a much more doubtful proposition with respect to the Agreement on Rescue and Return and, as Judge Lachs recognizes, in relation to the Convention on Liability. But it should not necessarily be assumed that all the principles and rules set out in any particular treaty are or have become *in toto* part of customary international law. It may well be that some of the rules stated in a treaty are part of customary law while others are not. This appears to have been the view of the International Court of Justice in the *North Sea Continental Shelf* cases (*I.C.J. Reports*, 1969, p. 3). It will be recalled that, in that case, the Court held that the rules stated in Article 6 of the 1958 Convention on the Continental Shelf were not binding on a signatory to the Convention which had

not ratified it, but indicated that certain of the earlier Articles might state principles or rules of customary international law. It is in the light of considerations such as these that the reader is advised to maintain an attitude of reserve on the extent to which any particular proposition stated in this book has or has not become part of customary international law, while at the same time accepting the underlying proposition that much of what has now been incorporated in treaties should no doubt be regarded as part of 'the law'.

FRANCIS VALLAT

Le Juge devant le marché commun. By Robert Lecourt. Geneva: *L'Institut Universitaire de hautes études internationales*, 1970. 69 pp. Fr. 9.

Few people could be better qualified to write this book than M. Lecourt who has been a member of the Court of Justice of the European Communities since 1962 and is now its President. He has written an incisive and elegant *tour d'horizon* of the European Communities and their law. The author's own descriptive term for his book is *un périple*—a circumnavigation—at each of the three stages of which he poses a question: *un droit autonome, pourquoi? un droit efficace: comment? un juge communautaire: pourquoi faire?*

The first question is approached by outlining the genesis of the Communities founded on a combination of legal obligation and political co-operation. We are shown how the balance between these two equally important elements is maintained through the institutions of the Communities and through Community law, the various forms of which are described. A uniform rule of law is said to be '*la pierre angulaire de toute communauté. De cela tout découle*' (p. 20).

The theme of ensuring the authority of Community law is expanded in connection with the author's second question. He adopts a partly analytical and a partly synthetical approach. He first explains how the mosaic of Community law has its basis in a number of traditional branches of the law both private (civil law, commercial law, social law and criminal law) and public (constitutional law, administrative law, fiscal law and international law). The classification of social law and criminal law as branches of private law seems somewhat idiosyncratic. He then turns to the three fundamental characteristics of Community law, namely its obligatory nature; its direct effect; and its supremacy over municipal law. Each of these is shown to be necessary to the realisation of the aims of the Treaties.

Lastly, M. Lecourt deals with the crucial role of the judge in applying Community law. He distinguishes two principal means whereby co-operation is achieved between the national judge, with his natural loyalty to his own legal system, and the Community Court. The first is by means of contacts between national courts and the Community Court, principally through the procedure for preliminary rulings. The second is the methods of interpretation adopted by the Community Court. While these methods are obviously designed to realize the aims of the Treaties the Community Court is seen striving to avoid encroaching on the proper preserve of the national judge. This has resulted in the Community Court's establishing what M. Lecourt calls '*un véritable tête-à-tête judiciaire entre elle et le juge national*' (p. 59).

This book gives a clear and authoritative picture of the nature and significance of Community law and as such it could be read with profit by judges and lawyers in the new member States of the Communities.

J. W. BRIDGE

International Privileges and Immunities. A Case for a Universal Statute. By DAVID B. MICHAELS. The Hague: Martinus Nijhoff, 1971. xx+249 pp. (including appendices and index). Gld. 36.

One hundred States have currently acceded to the Convention on the Privileges and Immunities of the United Nations and seventy to the Convention on the Privileges and Immunities of the Specialized Agencies. Both conventions are couched in relatively imprecise terms and so exact study of international privileges and immunities demands mastery of the plethora of host nation agreements and other bilateral treaties, by which the details of such immunities are currently regulated.

In the present volume Professor Michaels examines a large, randomly chosen, selection from the treaty practice of international organizations on the immunity issue, and considers in detail the position of the most significant organizations. His aim is to identify areas of agreement and his conclusion is that a uniform statute regulating international immunities is both possible and desirable. The terms of the proposed statute are set out and can be seen to be derived from what the author regards as the best features of existing practice.

It is clear that this work has involved an immense amount of painstaking research. Although the treatment accorded to individual organizations is rather brief, no survey which ranges as far afield as the Cape Spartel Lighthouse Convention and the Pan-American Sanitary Bureau can be said to lack breadth. The extensive third appendix sets out in clear and concise tabular form the author's elaborate investigation of the treaty practice of organizations within the United Nations system.

A number of important points emerge from Professor Michaels's study. The author observes that the enjoyment of immunities carries with it considerable prestige and recognizes that for international judges, for example, such prestige commendably enhances the standing of their organization. Prestige, together with the financial advantages which tax privileges confer, are also recognized to be magnetic recruiting agents for international organizations. The author considers, however, that the main justification for immunities is to be found in their functional role and suggests that a rational approach to immunities must relate them to the international official's function, rather than to his status.

The difficult position of one who is employed by an international organization in his home State is another recurrent theme. The author, while deploring the inequality which stems from treating such employees differently from their colleagues, recognizes that identical treatment is not always practicable and makes special provision for such cases in his proposed statute. Clearly Professor Michaels is right to suggest that the present situation is both unsatisfactory and remediable. Examination of international practice shows that the nature of an official's task, rather than the job of his organization, largely determines the immunities he currently enjoys. Since this is so, there would seem to be an unanswerable case for substituting a single, rather specific, multilateral convention for the present multitude of bilateral agreements, many of which vary only in unimportant details.

Opinion will differ on the merits of Professor Michaels's particular proposals. His model convention is a more detailed version of the existing general conventions, modified by provisions taken from status of forces agreements and the Vienna Convention on Diplomatic Relations. It is admittedly not intended to be comprehensive; and the idiosyncratic demands of States on customs allowances, for example, are seen to render absolute uniformity impossible. A case could certainly also be made out for granting

exceptional immunities to international judges and perhaps to members of international peacekeeping forces. Also, Professor Michaels's proposal that immunity be refused in cases involving a 'felonious act' would seem likely to give rise to more difficulties of interpretation and application than the author recognizes.

The book is lucidly written and well produced. Besides that already mentioned, the appendices set out a partial list of the international organizations considered, selections from the three major conventions on international privileges and immunities and extracts from documents pertaining to regional practice, including the Statute of the Council of Europe. There is an extensive bibliography, largely confined to works in English, a good index and a detailed table of contents. Professor Michaels's work can be recommended as an interesting and concise survey of an increasingly important subject.

J. G. MERRILLS

Law and the Indo-China War. By JOHN NORTON MOORE. Princeton, N.J.: The University Press; London: Oxford University Press, 1973. xxxvi + 598 pp. (documents, bibliography and index, 196 pp.). Hardback £11.25, paperback £4.75.

All the chapters in this book, except the first, are reprints of articles by the author which had previously appeared elsewhere. This inevitably makes the book repetitive in places, a fact which is doubly unfortunate in view of the author's sometimes difficult style, and adds unnecessarily to the length and price of the book.

The first part of the book is entitled 'Observational Standpoint' and consists of two chapters. The first chapter examines the role which international law plays in the management of international conflict—or, rather, the role which international law *can* play, because the author admits that the United States has often paid insufficient attention to international law, although he maintains that United States interests have suffered as a result. The author argues convincingly that, in order to understand the true role of international law, it is necessary to see international law, not merely in terms of courts and rules, but in terms of a wider and more sophisticated process; writers like Kennan and Morgenthau, he suggests, were merely criticizing a caricature of international law. The second chapter is a eulogy of the jurisprudential theories of McDougal and Lasswell, which, according to the author, 'may well be the most important jurisprudential achievement of the century'.

Chapter three lists a large number of factors to be taken into account to determine the legality of intervention. The author's approach is highly sophisticated and shows great political awareness, but runs the risk of providing arguments which could be used on either side in any intervention. In the absence of compulsory judicial settlement, the author's approach contains too many variables to provide a clear dividing line between legality and illegality. Chapter four, which was written a year or two after Chapter three, distils the conclusions of Chapter three into something which almost produces workable rules—but not quite. Leaving aside Chapter five, which is a book review, we come to Chapter six, which summarizes the role of regional arrangements in the maintenance of world order.

The third part of the book deals specifically with the Indo-China war, and is less abstract and, perhaps for that reason, more readable than the previous parts of the book. Chapters seven to nine contain a very able defence of the United States involvement in the Vietnam war, and your reviewer found most of the arguments

convincing. However, there is evidence that the uprising in South Vietnam received little or no help from the North during the early days in the late 1950s, and it is undeniable that the United States was at that time providing the Saigon Government with considerable assistance in the form of money, weapons and military advisers, so that the assistance which Hanoi gave to the insurgents from 1960 onwards might be justified as lawful counter-intervention to offset the assistance previously given by the United States to the Saigon Government; this is an argument which the author does not adequately meet. Chapter ten defends the United States intercession [*sic*] in Cambodia in 1970; but the author relies on precedents like the *Altmark* incident without even mentioning the criticism of such precedents by writers such as Brownlie.

The fourth part of the book deals with issues of United States constitutional law concerning the use of armed forces abroad, and the book is completed by documentary appendices (containing the texts of various treaties, of statements by the State Department Legal Advisers and of the Tonkin Gulf resolution), a bibliography and an index.

MICHAEL AKEHURST

The Study of International Affairs: Essays in Honour of Kenneth Younger. Edited by ROGER MORGAN. London: Published for Chatham House by Oxford University Press, 1972. 309 pp. (including indices). £5.

The thirteen essays in the present volume concern various aspects of international relations. Three are of particular interest to international lawyers, and with this remark the reviewer doubtless confirms the view expressed in Mr. Shonfield's introductory essay that in general international lawyers are too reluctant to transcend the boundaries of their discipline. The point is well taken and Mr. Shonfield's explanation of the development of international relations as a social science, particularly the demands for greater explicitness in place of the earlier somewhat anecdotal approach to international affairs, provides the international lawyer with much food for thought.

Interdisciplinary studies are also emphasized in the essays by Mr. Fawcett and Dr. Higgins. The former examines a number of striking examples of the unscrupulous use of the rhetoric of human rights in the political arena. Interesting as this account is, it would seem to be worth drawing some distinction between cases of out-and-out cynicism and cases in which the views expressed by States, however unconvincing they may seem, represent genuine conflicts of values on human rights questions.

Dr. Higgins writes on 'International Law and the UN system' and skilfully deploys the heavy artillery of the Yale Law School's policy-oriented jurisprudence against those who refuse to recognize the role of law in United Nations' affairs. Clearly intellectual flexibility must be the keynote of a realistic examination of, say, the General Assembly's law-creating role. One can admit that the line between law and politics must sometimes be blurred, yet question some facets of the policy-oriented approach. Is it, for example, correct to think of law in terms of 'matching normative opposites', for example, aggression/self-defence, territorial sovereignty/extra-territorial jurisdiction, between which 'the decision-maker must make a choice in the light of all the circumstances and agreed objectives' (p. 47)? Of course, as Dr. Higgins says, rules of law do not interpret themselves, but this does not mean that for legal purposes every situation can plausibly be characterized in two opposite ways. There is a clear and important conceptual distinction to be drawn between rules and exceptions to rules. Though borderline cases will pose difficult questions as to whether it is the rule or the exception

that is to be applied, not all cases are borderline. So clear transgressions of the rule cannot convincingly be presented as examples of the exception and vice versa.

In modern analytical jurisprudence a great deal of attention is currently being paid to rules and the concept of interpreters' discretion. It would be paradoxical if, in a commendable attempt to enjoy the fruits of other disciplines, international lawyers were to overlook the insights of their own.

J. G. MERRILLS

International Law for Students. By D. P. O'CONNELL. London: Stevens & Sons, Ltd., 1971. xviii+445 pp. Hardback £5.00, paperback £3.25.

The past ten years have seen something of a boom in the writing of textbooks on international law with the result that students are now provided with a varied choice. Professor O'Connell's deservedly celebrated two-volume treatise, now in its second edition, came at the start of that boom, and the book under review is an epitome of that treatise designed specifically for students.

The precise market and aims of this book are set out in the Preface. 'It is intended as a textbook for the average student who studies international law at an advanced stage in his law course, and it is not intended to dispense with the use of the general treatise by honours or postgraduate students' (p.v.) The book is adapted to a course on international law which 'aims at producing legal practitioners who will have sufficient grasp of the fundamentals of the subject to be useful to governments, and also to law firms engaged in advising clients with foreign investments and contracts with foreign governments' (ibid.). Professor O'Connell maintains that international law has a decreasing role in modern law school curricula. He believes that one of the reasons for this 'may be that too much emphasis has been thrust pedagogically on international institutions and too little attention paid to basic doctrine' (p. vi). For that reason this book 'aims at an exposition of the traditional field of international law' (ibid.). Readers are recommended to use Bowett's *Law of International Institutions* as a companion text.

This book is a skilful and accurate condensation of the author's general treatise. All the chapters of the general treatise are represented except those on the Commonwealth and its French and Dutch equivalents and on responsibility with regard to monetary sovereignty. The chapters on treaties, succession (as one would expect), territory and State responsibility are particularly successful. The demands of condensation, however, have resulted in some sacrifices. The approach of this book is less international and more Anglo-American than its parent. There are also some rather sweeping propositions, for example in the description of the jurisdiction of the Court of Justice of the European Economic Community (pp. 419, 420), and one wonders what the 'average student' would make of such propositions. Assistance in the form of references for further reading is lacking.

Despite the skill and accuracy with which this book has been prepared, some reservations may be expressed concerning its value as a basic text for students in British universities. It is, in the reviewer's opinion, a mistake in a book designed for students to play down the controversy over the legal nature of international law; a failure to tackle this controversy is likely to increase the student's natural scepticism. Whilst the reviewer would agree that the basic principles of international law should be given due emphasis, is it not unrealistic to teach those principles divorced from the context, both political and economic, within which they function? While Professor

O'Connell does, of course, deal with specific provisions of the United Nations Charter when they impinge on the law, what is lacking is a discussion of international law in general in relation to the structure, role and practice of the United Nations. To refer the reader to a separate book, however excellent, written with a different aim in view, is an unsatisfactory substitute.

This leads to the question of the type of course for which this book was written. In many British universities it is believed that international law is included in the curriculum not so much with a view to equipping intending practitioners to cope with international legal problems but because it is thought that some knowledge of international law should be part of the intellectual equipment of a graduate in law. Thus the significance of international law in British law schools tends to be more educational than vocational. Such a philosophy, whilst not minimizing the importance of the rules of law, permits and indeed demands the adoption of a broader, contextual approach than that to be found in this book.

J. W. BRIDGE

International Law and the New African States. By FELIX CHUKS OKOYE. London: Sweet & Maxwell, Ltd., 1972. xv+225 pp. £4.

Dr. Okoye divides his book into five chapters containing a discussion of historical problems, the relationship between African municipal law and international law, problems of State succession, the Organization of African Unity (O.A.U.) and the impact of African States on international law. The historical introduction is unfortunately not supported by the evidence which may be expected in a work taking history as its starting-point, but for this the deplorable absence of published African source material is to blame and not the author. Such material extends to hundreds of treaties concluded by European Powers with African countries up to the end of the nineteenth century when the partition of the African continent was complete. With the exception of E. Hertslet's 'Map of Africa by Treaty', there is no systematic collection of African treaties allowing international lawyers to explore nineteenth-century developments. The author makes reference to the case of *Ethiopia and Liberia v. South Africa* before the International Court of Justice which in its decision of 1966 came to the conclusion that Ethiopia and Liberia had no legal interest in the case of *Namibia*. Had the Court explored the historical antecedents of the Mandate System, it would have found that the Congress of Berlin of 1885 proclaimed an 'Official Guardianship' over African communities (Commission VI) and that Ethiopia and Liberia expressed such a legal interest by signing the Brussels Act of 1890.

In the chapter on African municipal law and international law, the author distinguishes anglophone and francophone African State practice and discusses a number of interesting cases which illustrate the attitude of African States in this field. The chapter on State succession is perhaps the best in Dr. Okoye's book. He examines the distinction between personal and real (dispositive) treaties and the view which regards the former as non-transmissible while admitting transmissibility of the latter. Criticizing this traditional distinction he comes to the conclusion that it 'has little relevance to State succession problems raised by colonial independence'. As to boundary treaties he states after the examination of a number of boundary disputes that though the law of succession would in principle apply, 'the colonial frontiers are not necessarily unchangeable'. In the chapter on the O.A.U., the author offers a useful discussion of its

structure and functions and of the factors which tend to undermine its effectiveness. At the end of his work the author tries to assess the impact of African State practice on international law. In this respect he refers to the principle of non-intervention in the domestic affairs of sovereign States, the right of self-determination of peoples in self-governing and colonial territories, the international protection of human rights, protection of foreign investment and international economic law based on the idea of reciprocal co-operation. I would add the principle of non-reciprocity in favour of developing countries as strongly advocated by U.N.C.T.A.D. To what extent some of these principles belong to the field of law or to the field of politics remains debatable. Some of them have been defined with more precision in doctrines of Latin American origin. Generally speaking this is a work of considerable importance for international lawyers and political scientists whose concern is the position of Afro-Asian countries within the Family of Nations.

CHARLES HENRY ALEXANDROWICZ

L'Erreur dans les traités. By ANDRÉ ORAISON. *Bibliothèque de droit international*, vol. LXVIII. Paris: *Librairie générale de droit et de jurisprudence*, 1972. 277 pp. Fr. 42.

Mistake is a subject which, though recognised to be difficult, rarely receives more than cursory treatment in general works of international law. Apart from rectification of textual errors, the occasions on which mistake has been successfully pleaded are remarkably few and there is accordingly little certainty as to what constitutes actionable mistake. The Harvard Law School in its draft Convention on the Law of Treaties of 1935 prepared a thorough analysis to support its article on Mutual Mistake, as did also Tomsic (1931), Vitta (1940) and Soulle (1963) in their monographs on the subject. With the signature of the Vienna Convention on the Law of Treaties, 1969, with its inclusion of Articles 48 and 79 specifically relating to mistake in treaties, and the discussion of mistake in the decisions of the International Court of Justice in the *Sovereignty over certain Frontier Land* case, 1959, and the *Temple* case, both phases, 1961, 1962, an up-to-date appraisal of the doctrine of mistake is timely, and this André Oraison now provides.

The basic approach of the present work is derived from French civil law and treats error as a defect vitiating the will of a party entering into a consensual obligation, 'un vice du consentement'. The study is, therefore, mainly concerned with bilateral treaties and mistakes made in connexion with them. The author expresses the opinion that there is no theoretical reason why error should not be equally recognized as a defect in multilateral treaties; the will of a contracting State may be equally affected by error, whatever type of obligation is undertaken, and, indeed, he accepts that, assuming a unilateral declaration can give rise to an international obligation—as did M. Ihlen's declaration on behalf of Norway in respect of Danish sovereignty over Eastern Greenland—such a unilateral expression of the will of a State can be rendered defective by error.

Autonomy of the will as the theoretical basis for contract in private law has had less acceptance in the common law than the continental systems. When adopted into international law, its application must conflict with the procedures of ratification and international conference and the doctrines of State capacity, full powers, acquiescence, preclusion and prescription which all work to bind a State by what it does, and to

construe its conduct as the accurate and irrefutable expression of its will. If a theoretical system is to admit of mistake by States as a result of which they may escape liability for their promises, it will be necessary to consider the scope of such a doctrine in the related fields of State responsibility, and of decisions of international organizations and international tribunals. In all of these fields, the expression of the will of the State, international organization or tribunal may have been distorted by some mistake. Are they to set aside established procedures of conduct in favour of some inner will? Practical considerations as well as general policy may restrict the scope of such a doctrine. Certainly the decisions in the *Arbitral Award of the King of Spain* case and in the boundary award between Chile and Argentina support a restricted application of mistake as far as international tribunals are concerned.

Such matters are outside the scope of André Oraison's work, though in his introduction he does consider whether the doctrine of the infallibility of States forbids the recognition of defects in the expression of their will. Rejecting this, largely because of the frequency of error in State practice, particularly in relation to matters of geography and cartography, he then compares the operation of error to that of duress and fraud which also vitiate the consent of States. He proceeds to divide error into three types—*erreur obstacle*, *erreur matérielle* and *erreur essentielle*. He deals first with *erreur obstacle*—a dialogue of deaf mutes—where both parties are mistaken as to the other's understanding of the transaction. He cites the interesting affair concerning the Treaty of Ucciali, 1889, which Italy asserted was a treaty establishing a protectorate over Ethiopia and the Emperor Menelik maintained was merely one of alliance and friendship. The argument was terminated by the unilateral action of the stronger party imposing its version of the treaty on the weaker State. *Erreur obstacle* is of theoretical rather than practical interest in the modern law of treaties. The second type of error—*erreur matérielle* or textual error—is a well-recognised defect which permits the parties to resort to the limited remedy of rectification. The present work sets out clearly the various types of error—in punctuation, typing, calculation, spelling, expression, and translation which may occur and illustrates each type from State practice.

In the second part of the book rectification is stressed as the sole remedy for this type of error. There can be no claim to avoid the treaty by one of the mistaken parties. Rectification is consequently itself dependent on the agreement of the parties. This may be effected by initialling amendments in the text, by the exchange of notes between the contracting States, by reference to an arbitrator, expert or other third party who recommends amendments, or by the new procedure suitable for rectification of multi-lateral treaties, prescribed in Article 79 of the Vienna Convention. This valuable article, itself an excellent illustration of the useful purpose served by the Vienna Convention, is shown in the present study to be based in part on the U.N. Secretary-General's experience as depositary for international treaties, in part on the procedure followed by Poland as the depositary State in obtaining the rectification of the word, 'expéditeur' to that of 'transporteur' in the Warsaw Convention on Carriage by Air, 1929, and in part by the procedure followed in the United Nations in the correction of the Chinese text of the Genocide Convention, 1948. The logical implications of rectification are also here worked out; textual error as an obstacle to the true agreement of the parties can be raised at any time, there is no prescriptive time-limit and once a new text has been agreed it may, unless the parties agree otherwise, replace the old *ab initio* with retrospective effect.

One would like to have seen some consideration here as to whether the remedy of rectification might not be broadened to cover mistakes which arise from the use or reference

to maps in treaties. Many of the geographical and topographical errors of the past, such as those that arose between the United States and the United Kingdom in the definition of the boundary between Canada and the United States of America which are much cited in the present study, might well have been disposed of under this 'sliprule', particularly if the scope of the error and the amendment required were capable of determination by an independent third party. Even where States were widely divided on the meaning of a particular boundary treaty, they rarely sought its total avoidance, contenting themselves with a request for the amendment of the mistaken clause. Oraison argues that this practice provides support for the divisibility of treaty clauses vitiated by error, but it might equally provide evidence of an extended type of rectification.

The third and final type of error is *erreur essentielle*—fundamental error, and the examination of this type and its effect occupies the greater part of the book. Oraison insists that this error must conform with two conditions. First, judged objectively, the mistake must be one of substance: at common law this has generally excluded unilateral mistakes made by one party unless the mistake can be linked with fraudulent or negligent conduct of the other party which leads to responsibility (see Article 29 of the Harvard Law School Draft of 1935). Oraison skilfully shows how the English rapporteurs in their drafts to the International Law Commission were progressively persuaded to widen their scope to the more liberal approach of the Roman law systems which allow a remedy for unilateral uninduced mistake but award an indemnity to the other party who acted in good faith. Article 48 accordingly reads 'a State may invoke an error . . . which was assumed by that State'. He also shows how mistake of substance is deemed to exclude mistake as to motive, value and error of law. On the authority of the *German Interests in Upper Silesia*, the *Serbian Loans* and *Eastern Greenland* cases of the Permanent Court, the *Abu Dhabi* arbitration and the *Temple* case, mistake of law is confined to mistake about international law to the exclusion of internal State law and possibly even regional interstate law; Oraison shows from its discussions that the International Law Commission favoured a flexible rule when it drafted Article 48 to include error which 'relates to a fact or situation'.

The second condition, the subjective test, requires the parties' conduct to be taken into account. Induced mistake may involve fraud on the part of the party who was not mistaken. Equally the mistaken party may by his own negligence, acquiescence or delay be barred from alleging his mistake. These disabling factors are logically considered in the light of the Court's ruling in the *Temple* case:

'It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent, if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error'. The author agrees with the formulation of the rule in Article 48 (2) which omits the second phrase 'could have avoided it' as imposing too heavy a burden of proof on the mistaken party.

This rigorous analysis of the elements required to establish error, though refreshing in its clarity and logic, inevitably results in an academic treatment of the subject which is largely unsupported in its detail by international law practice. Oraison cites only two cases where the mistake conformed to his definition of fundamental error, the *Sainte Croix River* and *North Eastern Boundary* disputes between the United States of America and the United Kingdom, both mainly resolved by diplomatic rather than legal action. He might well have asked himself why in the many incidents which he cites in which error was raised it was so rarely successful. May it not be that frequently

an alternative legal solution was available? Mistake is a matter which both layman and lawyer may freely allege at the beginning of a dispute but as the issues refine, the decision may turn more on impossibility of performance, frustration of the venture, breach of a fundamental term or even the objective interpretation of an ambiguous text.

In the final part of the work *Oraison* contrasts total nullity with the voidability of the treaty at the suit of the mistaken party on resort to a tribunal. He favours the latter in that it avoids any resort by a mistaken party to the unilateral sanction of declaring a treaty null and void. It also permits of divisibility of the clauses of the defective treaty, controls retrospective invalidity and enables the defences of acquiescence and prescription to be used where there has been delay in raising the mistake. He shows that international practice has not been consistent. The *Schlessinger* case between Germany and Roumania, 1935, the *Mavrommatis Concessions* case and the *Temple* case imply that total nullity may be the result of a treaty vitiated by error but the more restricted remedy has been adopted in the Vienna Convention, Article 42, where it is stated: 'The validity of a treaty . . . may be impeached only through the application of the present Convention.'

The conclusion, reiterated throughout the work, and broadly supported by the rejection of error as a valid plea in every case before the Permanent Court and the International Court, is that mistake has a very restricted scope in international law. This is attributed to the need for stability in international relations and the use of treaties as international legislation and norm-making rules which cannot be lightly upset by allegations of error. The State in international law is less protected than the litigant in the municipal courts and André *Oraison* feels strongly that this may make for injustice at a time when undeveloped nations are entering into treaty relations with older established States. The answer to this may be to recommend such undeveloped States to engage themselves an international lawyer to provide them with a better foundation for their claims and protection of their rights on the lines indicated above than they can hope to get from reliance on the academic plea of mistake. None the less there is much sense and a great deal of stimulating matter to be found in every section of this work. It is refreshing to see international law sources subjected to such disciplined analysis and the work is highly recommended. The book would be of greater use if it had been accompanied with an index and list of cases cited. There is a useful bibliography.

HAZEL FOX

International Migration Law. By RICHARD PLENDER. Leyden: A. W. Sijthoff, 1972. xxi+339 pp. Fl. 55.

In this work the author aims to identify the restrictions which are imposed by international law on each State's power to restrict immigration. To this end he considers the details of State practice in regard to a State's duty to admit its nationals, exceptional duties to admit aliens, migration for employment, 'quasi-migration' (that is, entry for temporary purposes), the position of dependants and of refugees, and prohibited immigrants. This treatment is prefaced by a somewhat lengthy introduction dealing with the relation of immigration law and nationality law, and with the historical origins of the exclusionary power, and it is concluded with a useful note on naturalization. In many respects, however, the details of municipal law, while themselves interesting as an illustration of State practice, tend to take precedence over the

international law aspects. The author suggests that the duty of a State to admit its own nationals may be owed not only to a second State which may wish to repatriate them, but to any legal person with a recognized interest in the preservation of the citizen's human right to enter his own country. He does not, however, elaborate on the possible sources of this obligation, or on the particular relevance of regional organizations established by treaty. Indeed, treaties generally, as a source of a right of entry for both aliens and nationals, receive only a passing mention. Freedom of movement within the European Economic Community is briefly covered, but without reference to the latest developments, while little at all is said about the role of bilateral treaties of commerce and establishment. In addition, the author's criticism of the 'oblique' use of the European Convention on Human Rights to protect a right of entry is scarcely justified in the context of a broader concept of human rights, and his doubts regarding *locus standi* in the matter of enforcement of the norm of non-discrimination would have benefited from reference to certain statements of the International Court of Justice in the *Barcelona Traction* case. While this work presents a much needed introduction to the workings of municipal systems in regard to the entry and exclusion of aliens, it might have been expected to deal also with the very serious problems which may be raised by their expulsion.

G. S. GOODWIN-GILL

The Advisory Jurisdiction of the International Court. By DHARMA PRATAP. Oxford: Clarendon Press, 1972. xvi+292 pp. £6.

This is a careful and comprehensive study of all questions relating to advisory opinions given by the International Court of Justice as well as its predecessor. The whole of the scene is reviewed, frequently with an almost excessive amount of detail. The first of the five chapters contains a historical survey. The second discusses the institution of advisory proceedings, while the third is devoted to the jurisdiction of the Court to render an opinion. There follow chapters on the procedure and, finally, on the nature, the reception and the effect of the opinion.

The subject is not one that is likely to fascinate the general body of students, but those who are concerned with advisory procedure will derive much benefit from the author's investigations, and they will welcome the publication of this book which is based on a doctoral thesis supervised by Sir Humphrey Waldo and submitted to and, presumably, accepted by the University of Oxford.

There is, however, one matter for regret. The book was published in November 1972. Yet we are told that it was 'while the book was in the Press' that the International Court rendered, on 21 June, 1971 its Advisory Opinion in the case of *Legal Consequences of the Continued Presence of South Africa in Namibia (I.C.J. Reports, 1971, p. 16)*. This remarkable Opinion is briefly, far too briefly, considered in a postscript of three pages. It is difficult to believe that the learned author with whose misfortune one will, of course, have much sympathy could not have found a way to do justice to the Opinion. It contains a mass of material on several questions which the author discusses at length and on which it is likely to have much (though, one hopes, not too much) influence. It is a pity that international lawyers will not have the benefit of the author's comments upon the significant pronouncements made and practices adopted by the Court and its members in regard to a number of procedural points which arise in connection with advisory opinions.

F. A. MANN

Human Rights in the World. By A. H. ROBERTSON. Manchester: The University Press, 1972. viii+280 pp. £3.60.

This is a welcome addition, by a distinguished author and practitioner, to the still rather thin *corpus* of works on the international protection of human rights. Dr. Robertson has drawn widely on his experience, not only as Head of the Directorate of Human Rights at the Council of Europe, but also as expert adviser to diplomatic conferences elsewhere, to produce a general and comparative study of the international action taken in this field. The work embraces both regional measures of implementation (by the Council of Europe, the Organization of American States, the Arab League, and—prospectively—by the Organisation of African Unity), and action taken on the universal level (notably in the Universal Declaration of Human Rights, in the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and in the Geneva Conventions of 1949). As one has come to expect from Dr. Robertson, the scholarship is accurate, the judgment balanced, and, if he is too diplomatic about agreements which sometimes amount to little more than ‘window-dressing’, this is perhaps only to be expected from someone in an official position. The work never fails to be lucid and interesting.

The book’s ambitious scope and high general standard make its deficiencies all the more disappointing. Passing over such relatively minor matters as the inadequacy of the index, this reviewer has two main criticisms. First, probably because several of the chapters have been previously published elsewhere, the book does not represent a properly integrated whole. On the one hand, there are overlaps, most notably between the chapter on the United Nations Covenants and the chapter which compares the Covenant on Civil and Political Rights with the European Convention. On the other hand, a greater effort could have been made to relate the various topics to one another, particularly by analysing more closely the differences of substance and of procedure between the major instruments. The second, and connected, criticism, is that the author has largely contented himself with an outline of the substantive rights and the procedures for implementing them without subjecting them to detailed—let alone critical—scrutiny. Lack of space certainly had something to do with this, but it is suggested that the difficulty could have been avoided if less important material had been excised. For example, whereas eleven pages are devoted to an exposition of the history and structure of the Organization of American States, the rights contained in the American Convention are dealt with in only three. Similarly, while fairly routine comment on the influence of Locke, the English and American Bills of Rights, and the Declaration of the Rights of Man extends to fifteen pages, the International Labour Conventions and the European Social Charter are hardly mentioned. Almost a hundred pages are taken up by the texts of the Universal Declaration, the European and American Conventions, the United Nations Covenants, and the Rules of Procedure of the Permanent Arab Commission on Human Rights; although it may, perhaps, be convenient to have these texts in the book, all except the last-mentioned are readily accessible elsewhere (notably in Brownlie’s *Basic Documents on Human Rights*), and it may be wondered whether the space could not have been put to better use.

However, this desire for a more detailed analysis is itself a tribute to the author’s ability to stimulate interest in his theme, and it is to be hoped that this interest will bear fruit in other, more detailed, comparative studies of the international protection of human rights.

MAURICE MENDELSON

International Institutional Law. By HENRY G. SCHERMERS. Leyden: A. W. Sijthoff, 1972. Vol. I: 'Structure', xxiv+303 pp. Dfl. 53. Vol. II: 'Functioning and Legal Order', xvii+485 pp., Dfl. 82.

Several of the draft treaties presented for consideration at the Third Conference on the Law of the Sea envisage the creation of one or more international organizations, but it is striking how often the details of the organization's structure and powers have been left blank. To some extent this may be due to an understandable desire to postpone grasping a political nettle until the last moment, but one cannot help feeling that in at least some cases it is also caused by unfamiliarity with the law of international institutions and the wide variety of options open to the informed and creative draftsman. Professor Schermers's full and informative volumes should help to fill this gap, though they are unfortunately marred by a large number of misprints and an inadequate index.

Rather than deal with the structure, functions, and so on, of each organization in turn—a boring technique adopted by too many writers—the author treats such topics as membership, decision-making and financing comparatively. Such an approach does have its disadvantages. For one thing, when considering organizations as heterogeneous as Benelux and the United Nations—and Professor Schermers has cast his net very wide—it was almost inevitable that the author would sometimes lapse into rather superficial comparisons of constitutional provisions, whereas a true understanding of an organization's charter often comes only from a detailed examination of its actual working. Limitations of space do not help, and even the 800 pages of this work are rather too little for an undertaking of such scope. To some extent, however, the deficiency can be remedied by following up the copious references to the secondary materials.

Despite the disadvantages of the comparative method, it does have its merits. Above all, it provides a most valuable reference tool. For example, when considering how a proposed organization could be funded, one can turn to the chapter on the too-frequently neglected subject of financing (incidentally, one of the most lucid and informative of the book's twelve chapters) and browse among the almost embarrassing profusion of possibilities which have already been tried, such as compulsory contributions (with or without choice of scale by the member), voluntary contributions, gifts, self-support and taxation. This information is complemented by useful summaries of the merits and demerits of different organizational devices, no doubt drawn to some extent from the writer's practical experience in the service of the Netherlands Government. We still await the definitive work on the law of international organizations, but meanwhile Professor Schermers is to be congratulated on providing scholars and diplomats with a very useful account of an important subject.

MAURICE MENDELSON

Die innerstaatliche Rechtsstellung der Internationalen Organisationen. By BERNHARD SCHLÜTER. Köln and Berlin: Carl Heymanns Verlag K.G., 1972. xiii+200 pp. DM.52.

This book investigates the legal position of international organizations within a national system of law, in particular within that of the Federal Republic of Germany. After an introductory part the author turns to his principal topic, namely the relation of international organizations to a State's private law. The question to which he devotes no less than 110 pages primarily involves the personality or existence of an international organization, its recognition and scope. But he also discusses a few other

matters such as whether an international organization may be treated as an alien (p. 137) or whether it can have a nationality (p. 141). A final part of the book (pp. 146–83) treats the submission of international organizations to the territorial jurisdiction of the State: are they subject to the local sovereign's tax, customs, social security or similar legislation? Are they, on the other hand, entitled to the exercise of public rights? Finally, to what extent are they subject to the jurisdiction of local courts or to a process of execution?

This is a scholarly and closely reasoned work which makes a useful contribution to a subject that is not yet exhausted and is in some respects difficult. One cannot help feeling, however, that some of the problems are artificial and self-created and that the author could have travelled much easier roads or, to put it differently, that he tends to discuss pseudo-problems. Thus in regard to an international organization's status and personality in non-member States he reaches a result which, in view of the universal teachings of private international law, one would have been inclined to describe as obvious: the conflict rule of the forum refers the question, not to the law of the seat (p. 127), but to the treaty creating the organization, i.e. to public international law (p. 129). Perhaps it is permissible to ask what else, in cases in which the State of the forum has granted recognition to the organization as an international person, could the courts and authorities of the forum do? But if the author's conclusion is in non-member States correct and, indeed, evident, why then is it necessary or useful to make such heavy weather of the solution of the same problem in member States? An *a fortiori* argument of almost compelling force would seem to present itself. What is gained by the elaborately argued suggestion that in member States personality stems from the legislation which incorporates the treaty into the municipal law? As Dr. Schlüter puts it, 'the personality of international organizations is not directly and exclusively founded upon the conclusion of a treaty under public international law' (pp. 43–5), rather a legislative act of incorporation is necessary. Such an act may constitute a measure of recognition, and it may be required to change or extend or adapt the municipal law in a number of respects, but the existence of the organization in the eyes of any State's municipal law ought not to be dependent upon it.

Dr. Schlüter will perhaps not object to the occasion of this review being employed for a reply to some criticism which Professor Makarov put forward in *Rebels Zeitschrift* (1972), p. 212, when discussing this reviewer's contribution on 'International Corporations and National Law' (this *Year Book* (1967), p. 145). Professor Makarov points out that the view, shared by Dr. Schlüter, according to which the existence of an international organization is governed by public international law in general and the treaty creating it in particular, has something in common with the doctrine of incorporation in the conflict of laws. He then asks whether it would follow that in non-member States 'the legal person in question is to be treated as non-existent'. The answer is so obviously in the negative that nothing more need be said: the fact that a State is not a member does not mean that according to its law the organization does not exist. Professor Makarov next denies that an international organization cannot have a seat in the accepted sense of private law. He points to provisions in the Articles of Association of Eurochemie and Eurofima, which determine places in Belgium and Switzerland respectively as their seat. But the article criticized by Professor Makarov suggested (p. 147) that these two companies were not international corporations. The examples are, therefore, ill chosen. However, the learned author could have drawn attention, for instance, to Art. V (9) (a) of the Articles of Agreement of the International Bank for Reconstruction and Development: 'The

principal office of the Bank shall be located in the territory of the member holding the greatest number of shares.' Even if this place, *in casu* Washington, could be described as the seat of the Bank, nothing would be gained unless it is intended (and Makarov may well have such an intention) to follow continental doctrine of private international law and to subject the Bank to the law of the District of Columbia. This would be a novel and, perhaps, an extravagant idea. If international persons such as States create by treaty another international person and if they make provision for the new creature to have a home on earth nothing is probably further from their minds than the conclusion that they thereby subject the international organization to the law of its 'seat'. And even if, in application of an unfortunate, but firmly established, rule of continental private international law, one were to subject the Bank to the law of the District of Columbia, could it reasonably be assumed that this legal system would throw any light whatever upon the status and the characteristics of an international organization such as the Bank? A little reflection on the implications of this question is bound to lead to the conclusion that the location of the international organization's principal office cannot be a suitable point of contact in the sense of the conflict rule.

F. A. MANN

Bibliography of International Criminal Law. By BART DE SCHUTTER, with the collaboration of C. ELIAERTS. Foreword by HANS-HEINRICH JESCHECK. Leyden: A. W. Sijthoff, 1972. li+422 pp. Fl. 58.

This is a formidable compilation the purpose of which is 'to analyse in a systematic way the main legal writings in the field of international criminal law, conceived in its broadest meaning' (p. xxiii). Dr. Jescheck, the Director of the Max Planck Institute for the Study of Foreign and International Criminal Law, specifies in the preface (pp. vii-ix) the main characteristics of the bibliography: (i) an attempt to deal with the subject on the broadest basis, devoid of any theoretical or conceptualistic limitations; (ii) the broad range of the literature included and the objective method of its collection; and (iii) 'a conciseness and reliability redolent of the best of the classical biographical tradition' (p. ix). In the main, this appraisal is fully justified.

The work is in offset print. It is divided into the following categories of relevant literature: General Studies, Extraterritorial Jurisdiction, Extradition, Transmission of Prosecutions, Minor Judicial Assistance in Criminal Matters, Status of Foreign Military Forces, War Crimes, Other International Crimes, Humanitarian Law, International Criminal Court, and United Nations Concern with International Criminal Law. Under each of these headings the literature is listed under the various countries. Under each country the works are then listed under the names of the authors or editors in alphabetical order. Each item of literature mentioned is given a number in series from 0001 to 5201. This gives some measure of the volume of the literature available on this subject and the thoroughness of the compilers. On pp. 352-97 is to be found the Authors' index with the serial numbers of the items of his literature against the name of each author in the index. This is then followed by an orthodox subject index (pp. 398-413). This is not so satisfactory in that under one subject heading, e.g. 'trial (Nuremburg)' there may be as many as 120 items, which makes reference to the main body of the bibliography essential unless one has an existing knowledge of the names of authors in that area of the subject.

Dr. Jescheck does warn in his preface (p. ix) that the work lacks 'absolute completeness'. A random selection under the title 'Status of Foreign Military Forces' shows some

omissions, oddly enough, of works published by the publishers of this bibliography. Nevertheless, with this caveat, it is a solid and praiseworthy compilation calculated to be of value to scholars and research workers in the field of international criminal law, a subject rapidly increasing in scope and importance. Developments in the specific areas of substantive law, jurisdiction and procedures have been very marked since the end of World War II when the main preoccupations were with war criminality. Today, international criminality is no less a threat to humanity than its domestic counterpart. It is possible to see, in the context of international criminal law, a move from the domestic approach, classical in nature, to a more international approach generating its own philosophy and methods.

Here we have, in one volume, a virtually comprehensive listing of the substantial *quantum* of literature upon international criminal law produced to date. This activity of scholars betokens the concern of jurists that the range and variety of international criminality should be met and answered by an effective, coherent and articulate system of international criminal law. Professor Bart de Schutter reminds us (p. xxi) that 'the corner-stone of criminal international law must undoubtedly remain (the) universal social conscience . . .'.

The work is somewhat marred by certain infelicities in translation into English. None the less as a painstaking and scientifically compiled bibliography this work will command the attention of jurists and penologists who will owe a debt of gratitude to Professor Bart de Schutter and his collaborators.

G. I. A. D. DRAPER

The Austrian-German Arbitral Tribunal. By IGNAZ SEIDL-HOHENVELDERN. *Procedural Aspects of International Law Series.* Syracuse University Press, N.Y., 1972. xi+261 pp. (including bibliography, tables, and index). \$15.00.

This book is the eleventh volume in the *Procedural Aspects of International Law Series*. It is a work of fine legal craftsmanship which merits the attention of those whose interest may not be aroused by the rather drab, albeit wholly accurate title. The Austrian-German Property Treaty of 1957 contained delicately balanced reciprocal concessions and compromises by which the parties strove to 'alleviate the tension which the [Austrian] State Treaty and its aftermath' has caused between them. A concise account of the property provisions of the State Treaty and of the contents of the Property Treaty appears in the first chapter. The exposition is clear, but requires the reader's careful attention. To the non-specialist in this field, the provisions are puzzling and complicated. The two States resolved to create a dispute settlement procedure for this Treaty, which is summarized by the author in his Preface as follows:

These provisions render a prior recourse to an inter-State Conciliation Committee obligatory before proceedings in domestic courts can be instituted. Moreover, they divest domestic courts of jurisdiction to interpret the Treaty in favour of an Arbitral Tribunal. These provisions have enabled the settlement of practically all controversies having arisen out of the dispositions of the Property Treaty. . . . In general, access to the Arbitral Tribunal was contingent upon a request by a domestic court, yet, once a case was pending before the Arbitral Tribunal, the parties themselves pleaded their case before it. Access to the Tribunal therefore did not depend on a State espousing the claim of the individual claimant (pp. vii and viii).

Readers familiar with the structure of the European Communities will note the resemblance between this procedure and that created by Article 177 of the E.E.C. Treaty for references from courts in the member States to the Court of the Communities for a preliminary ruling. Professor Seidl-Hohenveldern points up the comparison throughout his study. The similarity between the two procedures was no accident, as he explains (p. 32). The E.E.C. Treaty had been concluded only a few months before the Austrian-German Treaty and the relevant provisions 'were readily accepted as a model by the drafters of the Property Treaty' since the purpose to be served was the same: prevention of divergent interpretations of the finely poised and complex treaty by domestic courts.

Having set out the background to the treaty and explained the nature and functions of the dispute settlement machinery, the author describes briefly the work of the Conciliation Committee, the vital screen which settled nine-tenths of the disputes arising. Then comes an outline of the procedure before the Arbitral Tribunal itself, followed by the meat of the book, chapters on the limits of the Tribunal's jurisdiction and the way in which it meshed in with national procedure and the decisions of national courts; the law applied by it, and a useful guide to the individual rules of international law which it applied. This chapter forms a manual to the summary in an appendix, of nearly 100 pages, of the opinions of the Tribunal. Professor Seidl-Hohenveldern has put the profession in his debt for his clear and readable translations of the original opinions, and for summarizing them.

The monograph ends with a discussion of the way in which the opinions are received by the national courts and 'inserted' into domestic law. In his conclusion, the author supposes that 'some readers may wonder why [he] has taken the trouble to prepare a book on the dispute-settlement procedure employed in a controversy which practically has passed unnoticed by the world at large. Moreover, they may wonder why he presents this Austrian-German controversy in English' (p. 106). His reply is to hope that the solution found in this case may be a model for other cases. There is the future possibility of a comparable agreement on property and financial claims between Austria and the German Democratic Republic (some of the problems are examined at pp. 22-3). In the present case the machinery proved so successful that the four members of the Tribunal were always able to reach a unanimous decision, so that the provision for joint appointment of a neutral fifth member was never used.

The Procedural Aspects of International Law Institute is to be congratulated on enabling this work to reach a wider public. Professor Seidl-Hohenveldern has made a notable contribution to the literature of international economic law and to the law of treaty interpretation.

GILLIAN WHITE

Extradition in International Law. By I. A. SHEARER. Manchester: The University Press, 1971. xxiii+283 pp. (including index). £4.20.

Asylum and International Law. By S. PRAKASH SINHA. The Hague: Martinus Nijhoff, 1971. xii+366 pp. (including index). Gld. 50.40.

Each of these books deals with a subject on which, it may be argued, international law has little to say. Their common denominator is the principle of non-extradition of political offenders. This is perhaps the part of each subject which has the greatest jurisprudential content, and it is the most interesting section of each work.

Dr. Shearer states that his study of extradition 'has been prompted by the conviction that there already exists more common ground than is often supposed between national laws and practices of extradition, and that further harmonization is both attainable and necessary'. He is therefore to some extent concerned with suggestions *de lege ferenda* (especially when dealing with deportation at pp. 90-1). He gives a detailed account of the framework of extradition, describing the extent to which various States are bound by treaties, the scope of regional extradition arrangements, the incidence of extradition in the absence of a treaty, and methods of dealing with fugitive offenders other than extradition. This part of the book is amply supported by the appendices, which contain selected extradition statistics and treaty texts, and lists of extradition treaties and statutes. Two minor criticisms may be made: in the description of bilateral extradition treaties the extent to which independent members of the Commonwealth have succeeded to treaties concluded on their behalf is not always made clear, and the expressions 'United Kingdom' and 'Great Britain' seem to be used interchangeably.

Dr. Shearer then considers five particular aspects of extradition, surveying State practice in relation to each. The scope of his research has been extensive, and his attempt to cover the practice of a multitude of States is commendable. He starts with the nationality of the fugitive, and proposes a 'new approach . . . which would rest firmly upon the principle that the proper court for the trial of a criminal is the court of the *locus delicti*. It is suggested, however, that the extradition ought to be limited to the trial and judgment only; that an extradited national, once he has been sentenced by a foreign court, should be returned to his home State to serve the sentence imposed abroad but subject to regulations—including those relating to remission or reduction of sentence, parole and probation—in force in his home State' (p. 126). This is an interesting idea, although the possibility of securing the necessary provisions in many systems of municipal law seems remote; there would seem, however, to be little justification for confining it to *fugitive* offenders, as opposed to other erring aliens.

Secondly, Dr. Shearer deals with the acts for which extradition may be granted. He considers the enumerative and eliminative methods of definition of extraditable offences, and there is a brief discussion of the double criminality rule and of the problems, basically of terminology, which confront a court in deciding whether certain acts constitute an extraditable offence. The third topic is evidence of guilt. British Commonwealth and American courts are alone in requiring that the requesting State should make out at least a *prima facie* case of guilt; others merely insist that the request for extradition should comply with procedural requirements. The author feels that the production of some evidence of guilt is a very desirable requirement from the point of view of both the fugitive and the requested State.

In respect of political offences, Dr. Shearer considers that writers have been excessively preoccupied with a point which arises in a small minority of extradition proceedings. But he makes a comprehensive survey of the topic, and especially of English case law. His treatment of the subject is more satisfactory than that of Professor Sinha. The latter discusses a variety of offences and the way in which they have been regarded by the courts of various States. However, lucidity can only be achieved if the approach of the courts of each State or group of States can be traced, and if, for example, the decisions in *Ex parte Kolczynski* and *Schtraks v. The Government of Israel* can be compared. To be fair, Professor Sinha does compare these cases, but the comparison is tucked away in a note at the end of the chapter on political offences, whereas it should surely qualify for inclusion in the text.

Finally, Dr. Shearer considers procedural problems. His discussion of the relationship, as regards extradition, between the executive and judicial organs of government is particularly interesting. It would be valuable to have more details (if indeed they are obtainable) of the extent to which executive organs may and do refuse surrender after a court has ruled in favour of extradition, and the bearing which the possibility of such refusal has on a State's treaty obligations to extradite.

This, then, is a most useful book, yet the reviewer remains unconvinced by the author's protestations that the law of extradition may be regarded as part of international law, and feels that the proposed methods of 'harmonization', even if they commended themselves to governments, would nevertheless operate primarily in the field of municipal law.

Professor Sinha's book is also based on far-reaching research, but it suffers seriously from its layout—a fault which may well not be attributable to the author. The notes are grouped at the end of each chapter, and it is probably even more infuriating to have to interrupt one's reading to hunt for notes in the middle of the book than to have to turn to the end. Moreover, there is no index of cases, and the principles on which cases have been selected for inclusion in the list of 'Cases, selected' in the general index is obscure; the same applies to the list of selected treaties.

Part I of the book contains a history of asylum from primitive times to the Spanish Civil War, and a brief chapter on the legal and extra-legal bases for the grant of asylum. Part II deals with asylum from the viewpoint of the individual. A general review of the individual's position in international law leads to the conclusion that the individual has no right to asylum in customary law, and, further, that provisions in treaties for the exemption of political offenders from extradition do not operate to create such a right for the individual. Although the Universal Declaration of Human Rights provides in Article 14 (1) that 'Everyone has the right to seek and to enjoy in other countries asylum from persecution', this creates no obligations for States, and instruments dealing with human rights which do create such obligations, such as the European Convention on Human Rights, are silent on the subject of asylum. This Part concludes with a chapter (the longest in the book) on the international political refugee, and is concerned with the definition of such a person and, in particular, his treatment under the Convention Relating to the Status of Refugees of 1951. It is a thorough descriptive account, but adds little to the literature of the law relating to asylum.

Part III, on asylum from the viewpoint of States, has greater legal content. The subject is divided into territorial and non-territorial asylum. Of the former, Professor Sinha says that 'a decision to grant asylum constitutes a normal exercise of territorial sovereignty'. Extradition treaties create an exception to the right to grant asylum, but they in their turn normally contain an exception for the political offender. This exception is considered in detail but, as stated above, with less clarity than Dr. Shearer. For non-territorial (i.e. diplomatic, consular and maritime) asylum Professor Sinha asserts that there is no legal, but only a humanitarian, basis. After a detailed study of the practice of States, and especially of South American States, in relation to diplomatic asylum, he concludes that such asylum has not been established as an institution of regional customary law, and still less of customary international law.

The general impression created by this book is that asylum is a factual rather than a legal concept, but this should not be allowed to obscure the fact that Professor Sinha has dealt comprehensively with such law as there is, as the wealth of material included in the notes bears witness.

C. A. HOPKINS

The Vienna Convention on the Law of Treaties. By I. M. SINCLAIR. Manchester: The University Press; Dobbs Ferry, N.Y.: Oceana Publications Inc., 1973. viii + 150 pp. £2.40.

This book, the latest in the Melland Schill lectures series, is mainly a commentary on the most important provisions of the Vienna Convention. But it is also more than that. The author is second legal adviser at the Foreign and Commonwealth Office and has interesting things to say about the British practice on questions such as the colonial clause; he attended the Vienna Conference and throws light on the *travaux préparatoires* of the Convention, and especially on the Conference itself; he also discusses certain reservations to the Convention and one or two other developments since the Convention was signed. The book is particularly useful in examining the relationship between the Convention and customary law and the extent to which the Convention codifies customary law. Of course, as the author points out, State practice may follow the Convention in the future, even in the case of States which do not become parties to the Convention; in this context he discusses the *North Sea Continental Shelf* cases, but not the Attorney-General's report on the Simonstown agreement, which treated the Convention as an accurate statement of the law of treaties despite the fact that the Convention had not entered into force. Nor does he mention the judgment of the Court of Justice of the European Communities in the *European Road Transport Agreement* case (*Commission v. Council*, 1971), which has far-reaching implications for the treaty-making power of member States of the European Economic Community.

The book is of a high standard throughout, but one or two of the author's criticisms of the Convention seem rather harsh. For instance, he criticizes the Convention for treating error, fraud and corruption as grounds for invalidating treaties and says there is insufficient authority in customary law for treating these factors as vitiating factors. That may be so, but Article 42 (1) of the Convention wisely provides that 'the validity of a treaty or of the consent of a state to be bound by a treaty may be impeached only through the application of the present Convention', and this made it necessary for the Convention to contain an exhaustive list of grounds of invalidity. The drafters of the Convention were therefore compelled to embark upon 'progressive development' in the case of possible grounds of invalidity in respect of which customary law provided no authority one way or the other. Nor is it enough to criticize the wording of Article 62 on *rebus sic stantibus* (as the author does on p. 108), without suggesting how the wording could be improved; at least the spirit of Article 62 makes it clear that the *rebus sic stantibus* rule is an extremely narrow one, and that is the important thing. The last chapter contains a long and scholarly discussion of *ius cogens*.

MICHAEL AKEHURST

Fundheft für Öffentliches Recht, Systematischer Nachweis der Deutschen Rechtsprechung, Zeitschriftenaufsätze und Selbständigen Schriften. Edited by OTTO STROSSENREUTHER, DIETMAR EBERTH and PROFESSOR DR. JÖRG MANFRED MÖSSNER. Vol. XXIII. Munich: Verlag C. H. Beck, 1972. No price stated.

This systematic 'Index of Public Law' for 1972 is the 23rd volume in a continuous series in the field of German public law. The material containing books, articles and judicial decisions, is classified into two main parts, of which the first is of importance

to legal philosophers and to international and European Community lawyers (the second, third and fourth parts contain the material on German public law including labour law). The chapter on public international law deals with States in international law, the law of international organizations, individuals, transactions, economic law, territory (including the high seas, air space and outer space), disputes and the law of war and neutrality. The chapter on European law covers the European Communities as well as other European organizations such as the Council of Europe, E.F.T.A., O.E.C.D., N.A.T.O., C.O.M.E.C.O.N. and other agencies. The editors were assisted by Miss Riehe and Mr. Czerwinski of the University of Cologne. A characteristic feature of the publication is the reference to reviews in respect of books. At the end is a register of decisions of German, international and foreign courts. This is a publication which is indispensable to research workers in the field of international law, European Community law and German public law and which is bound to find its place on the shelves of law libraries throughout the world.

C. H. ALEXANDROWICZ

Recherches sur l'application dans le temps des actes et des règles en droit international public. By PAUL TAVERNIER. *Librairie générale de droit et de jurisprudence*. Paris: R. Pichon and R. Durand-Auzias, 1970. 351 pp. (including bibliography and indices). No price stated.

Although the vexed question of the intertemporal law is one which most international lawyers probably prefer not to think about, its practical importance is not in doubt. Matters as diverse as the validity of titles to territory acquired centuries ago and the law governing the operation of United Nations forces raise the problem in one form or another. Yet, as Dr. Tavernier remarks, international tribunals are notable more for the skill with which they avoid the issue than for any coherent analysis of its complexities.

Eschewing dogmatism, Dr. Tavernier argues that the delicate practical problems which arise in this area can be resolved neither by applying one of the several versions of the theory of acquired rights, nor by distinguishing, as Max Huber did, between making and maintaining the law. Dr. Tavernier's answer is to identify two principles, which he calls the principle of non-retroactivity of rules and acts and the principle of immediate effect. These separate but interdependent principles must, in the author's view, be combined with a close analysis of the specific situation in which the problem of the intertemporal law arises, with particular emphasis on the various time elements in the situation. It cannot be said that this approach derives a great deal of direct support from the existing law. On a topic such as this, however, a creative synthesis of fragmentary legal materials has much to commend it and is, as the author observes, greatly to be preferred to reliance on parallels drawn from municipal law or an over-theoretical approach.

Dr. Tavernier moves easily between abstract analysis and examination of international law. The treaty practice of a number of States is statistically surveyed for the light it sheds on the principle of non-retroactivity. The practice of international organizations is examined with the same aim. Here there is an interesting discussion of the time factor in relation to various Security Council resolutions on Rhodesia. The politically contentious nature of much of the material examined in this section,

however, reinforces the author's warning against too readily discerning in the activities of international organizations the emergence of new norms of international law.

The author notes, but does not see it as his function to discuss, the conflicts of interest and ideology which often lie at the root of controversies over the intertemporal law, especially when colonial titles are challenged, or aliens' rights are in question. Because demands for stability in international law collide so dramatically with demands for change, the lawyer's discussion of, say, the place of the intertemporal law in the Spanish dispute with Britain over Gibraltar, or the Indian dispute with Portugal over Goa, inevitably looks rather academic. But, though learned monographs do not solve international disputes, the scholar's search for a coherent legal framework is at least an attempt to remove one obstacle to settlement. By throwing light into so many dark corners Dr. Tavernier has made a welcome contribution to this end.

J. G. MERRILLS

International Customary Law and Codification. By H. W. A. THIRLWAY. Leyden: A. W. Sijthoff, 1972. xii+158 pp. Dfl. 29.50.

It is significant that, in spite of the increasing efforts being made to codify international law, the literature on the nature and role of international customary law remains undiminished—a clear indication of the fundamental importance of this source of international law. Dr. Thirlway's *International Customary Law and Codification* for which he was awarded the John Westlake Prize (1971) is a notable contribution to the literature. This work does not present a novel thesis but it is a very welcome re-examination, within an uncompromisingly traditional context, of the mode of international customary law-formation and especially of the 'continuing role of custom in the present period of codification of international law'.

Dr. Thirlway rigorously applies the classical norms of international law to the problem of law-formation in the modern international community. He is prepared to accept, for instance, that the sources of international law embodied in Article 38 of the Statute of the International Court of Justice do not constitute a closed class, but is categorical in affirming that 'no new source of law can come to exist except through the operation of the law flowing from one of the existing and recognised sources'. For this reason *inter alia*, General Assembly resolutions, however strongly supported, cannot be considered a form of 'international legislation' unless they are invested with the legal force to be derived from treaty-law or from customary international law. The same traditional approach is brought to bear on the problem of the rights of individuals in international law. Dr. Thirlway points out that the customs of international law derive from 'the *de facto* adjustment of conflicting claims and interests of the subjects of international law' and since in his opinion individuals are simply not subjects of international law, it follows that in such matters as the protection of human rights no customary international law norms can be developed. The principles of the Universal Declaration of Human Rights are thus incapable of forming part of the customs of the law and can pass into international law only by means of the treaty.

As far as the ingredients of an international custom are concerned, Dr. Thirlway reiterates the traditional formula. However, he lays significant emphasis on the importance of State practice: '... it is of the essence of a customary rule to be firmly earthbound, built upon a foundation of actual experience in the relations of States'. This emphasis on State practice has the important consequence of preventing mere

'declarations *in abstracto*' (as an example he cites the 1963 U.N. Declaration on Outer Space) from creating international customary law. As a result the claim for 'instant customary law' is dismissed.

The incapacity of customary international law to protect the rights of individuals is derived, according to Dr. Thirlway, from the simple fact that the individual is not a subject of international law. In support of this traditional position Dr. Thirlway argues that the individual is unable to enforce these rights (p. 10) and thus 'his complaint is doomed to remain in the wilderness outside the pale of international law so long as there is no international legal entity to espouse it'. This argument seems to blur the distinction between recognition of rights and their enforcement—a point which Sir Hersch Lauterpacht took when he observed that: 'The fact that the beneficiary of rights is not authorised to take independent steps in his own name to enforce them does not signify that he is not a subject of the law . . .'. (Lauterpacht, *International Law and Human Rights*, p. 27).

This book offers a lucid and elegantly written examination of an area of international law of enduring importance. Truth to tell, however, this reviewer is of the opinion that the nature of the international community does not lend itself to the 'clear and definite hierarchical structure of legal imperatives' so dear to analytical positivists and believes that the late Professor Friedmann was nearer the mark when he asserted that 'we must recognise that there are sources of international law of differing importance and definiteness' (see *Recueil des cours* (1969-II), p. 142).

This reviewer found Chapters 6–9 which deal with such topics as 'Custom as law ancillary to codified law' and 'Codified law and dissentient States' particularly useful besides being of topical significance. It is, however, somewhat disconcerting to find that such a small monograph contains so many errors in orthography.

L. D. M. NELSON

The Passport in International Law. By DANIEL C. TURACK. Lexington, MA.: D. C. Heath and Co., 1972. xviii+353 pp. \$16.50.

The relationship of the 'right to travel' to the possession of a passport is emphasized by the author in his opening Chapter. Thereafter, much of the material in this work is directed towards showing the advancement of freedom of movement through the activities of regional organizations. Consideration is thus given to developments under the auspices of, for example, the O.A.S., the Arab League, the Scandinavian Passport Union and Benelux. The treatment of E.E.C. provisions, however, is deficient and fails to take account of progress since 1968, particularly in view of the adoption of Regulation 1612/68 and Directive 68/360 and of the achievement of *de jure* freedom of movement. Nevertheless, the author presents interesting and useful accounts of the provisions, both national and international, which have established travel documents for refugees and crew members, and also of the facilitation of travel for officials of international and regional organizations, and international judges. In all cases the notes provide a thorough and detailed indication of sources and State practice.

Despite the title of the work, one is left with the impression that the passport remains essentially an instrument of municipal law. In a brief examination of the international aspects, reference is made to the role of the passport as proof of nationality, and in relation to diplomatic protection, deportation, and the recognition of States and governments. The author takes the view that 'international comity recognises that the

bearer of a legal passport will be readmitted to the issuing State if the passport is valid'. But on this matter, State practice reveals sufficient conformity to the norm of returnability, even where passports are issued to non-nationals, to warrant the conclusion that a rule of customary international law is involved. The right to travel as a human right is less well established and, in view of his recognition of the unlikely event of universal abolition of the passport requirement, the author's recommendations for the improvement of national policies will fall on less fertile ground.

G. S. GOODWIN-GILL

Les missions permanentes auprès des organisations internationales. By M. VIRALLY, P. GERBET and J. SALMON, with the assistance of V-Y GHÉBALI. Vol. I. Brussels: Établissements Émile Bruylant, 1971. 918 pp. (including index). Bfr. 3,600.

The subject of this massive study has hitherto received little systematic attention from international lawyers. Certainly no examination on the scale of the present work has been attempted before. With the burgeoning of international organizations and consequential growth of multilateral diplomacy the value of investigating the position and activities of permanent missions is obvious. The authors of the present study fulfil their important duty with conspicuous success.

A three-volume series is projected, the second volume of which will contain a number of case studies, and the third a study of permanent missions accredited to the United Nations in New York. In this, the first of the trilogy, the authors examine organizations based at Geneva, Strasbourg, Paris and Brussels, including the League of Nations, the United Nations Office at Geneva, U.N.E.S.C.O., the Council of Europe, the O.E.C.D., N.A.T.O., the E.E.C. and E.U.R.A.T.O.M. Each of the authors examines a particular part of this formidable list. M. Victor-Yves Ghéballi, for example, examines the League of Nations, and M. Jean J. A. Salmon the E.E.C. and E.U.R.A.T.O.M. Research is empirical, using lengthy questionnaires and interviews. Each organization is studied individually and in detail. M. Michel Virally's study of the United Nations office at Geneva, for instance, occupies 140 pages and includes exhaustive discussion of accrediting procedures, immunities, protocol, the history and composition of permanent missions and their functions, as well as a wealth of information in tabular form. The sections on other organizations are no less thoroughgoing.

It can fairly be claimed that the institutions studied are representative, including, as they do, examples of universal and regional organizations, military and economic organizations, cultural and technical organizations and inter-governmental and supra-national organizations. Nevertheless, generalizations about permanent missions, as M. Pierre Gerbet observes, must be treated with caution. Several important organizations are, of course, not dealt with in this volume and the organizations which are examined serve such different functions that comparisons are sometimes impossible. However, these studies lend support to some noteworthy conclusions.

M. Gerbet notes the tendency of permanent missions to multiply and to achieve formal recognition in constitutive instruments. He observes too their increasing detachment from diplomatic missions, at least in the more important organizations, and sees the permanent mission playing a more and more significant role in contemporary diplomacy. These developments are accompanied by an increase in the size of missions, which contain specialists in growing numbers. M. Gerbet contrasts the

functions of the permanent mission with those of the traditional diplomat. Whatever the organization, the permanent mission often seems to occupy a broadly similar position *vis-à-vis* other missions, the sending State and the institution. It frequently operates in a dual capacity, as a crucial part of both the domestic and the international policy process. There is here surely an analogy to be drawn with the role of the domestic court. Because issues of international law arise both between and within States a court seised of a domestic dispute may by applying international law be able to set foot on the world stage. Likewise in matters of policy, the permanent mission may operate as an instrument of both national and international decision-making. As the authors of this distinguished work demonstrate, the study of bodies performing this dual function lacks neither fascination nor relevance.

J. G. MERRILLS

De l'équité dans le règlement arbitral ou judiciaire des litiges de droit international public. By CHARLES DE VISSCHER. Paris: Éditions Pedone, 1972. viii + 118 pp. No price stated.

Before Article 38 of the Statute of the Permanent Court of International Justice made a clear distinction between judgments based on the sources of international law listed in paragraph 1 and judgments *ex aequo et bono*, arbitration treaties frequently directed arbitrators to decide cases according to the principles of international law and justice, or international law and equity. Even in more recent times references to justice and equity are often found in international judicial decisions and arbitral awards. Professor de Visscher's work is therefore particularly useful in surveying the application of equity by international judges and arbitrators. Despite its short length, the book ranges over a wide area; after some general chapters at the beginning, the author examines the relevance of equity to topics as diverse as abuse of rights, expulsion of nationals, interpretation of treaties, laches, acquiescence, estoppel, onus of proof, measure of damages, liability for the acts of rebels, nationality of claims, exhaustion of local remedies, non-discrimination, territorial disputes and the use of rivers. He also makes interesting comparisons between equity in international law and equity in English law.

The book is, however, concerned exclusively with the application of equity by international judges and arbitrators. It is interesting to speculate whether the author would have modified his optimistic attitude towards the role of equity if he had considered its place in the international legal system as a whole. As the author states on page 3:

La règle de droit est l'expression des rapports sociaux dans ce qu'ils ont de général. C'est, en effet, par l'entremise de sources formelles (traités, coutumes, principes généraux) indépendantes de considérations d'espèce, et, à ce titre, génératrices de droit, que la règle accède au niveau de droit positif.

L'équité apparaît dans le plan judiciaire comme une justice individualisée. Elle se conçoit par rapport à la règle dont elle invite à se départir dans la mesure où l'exige une justice adaptée à l'espèce.

And he admits that equity is consequently somewhat subjective. The presence of an 'individualized', semi-subjective equity in the international legal system might be desirable if compulsory judicial settlement existed in international law, but at present judicial settlement is optional and seldom used. Incidentally, if (as your reviewer believes) the unpredictability of judicial decisions is a major reason for the reluctance

of States to accept the jurisdiction of international tribunals, it is likely that the number of cases submitted to international tribunals will vary in inverse proportion to the reliance on equity by judges and arbitrators. In these circumstances there is a great danger that States will invoke equitable considerations as an exception to rules of law whenever obedience to the rules of law would be irksome (for example, the attempts by some States to justify anti-colonialist wars of national liberation as an exception to the general rule prohibiting the use of force in international relations); the concept of equity could be used to give an aura of respectability to such exceptions, even though the States invoking them will probably refuse to allow the validity of the exceptions to be tested by an international tribunal. What makes this process particularly dangerous is that ideas of equity often vary according to the interests and culture of the State concerned.

MICHAEL AKEHURST

An Introduction to the Law of the European Economic Communities. Edited by B. A. WORTLEY. Manchester: The University Press, 1972. vii + 134 pp. £2.40.

The difficulty with a series of only six lectures on a subject as complex as the law of the European Communities is that they are not sufficiently critical or exhaustive on any one point to be of much value to the expert, and are not sufficiently comprehensive to be of much value to the beginner. Whilst this book does contain some appetizing *hors d'œuvres*, the publication of the Melland Schill lectures given in 1971 does very little to meet the real needs of the law student, the legal profession, or the law profession at this moment. The lectures are, needless to say, competent. The expert can learn something from all of them. And they are rather well conceived from the point of view of explaining a subject new to a beginner.

Geoffrey North explains with clarity how the economics of Western Europe was one of the contributing causes of the creation of the European Communities, and the effect which the Common Market has had on increasing the geographical concentration of industry since its creation. One somewhat regrets this choice as an introduction to the subject (although this is not a reflection on the merits of North's lecture), since, at least to this writer, the political and diplomatic causes of the Common Market seem of greater importance than the economic. This writer found enlightening North's exposition of the growth of agricultural production in Europe caused by the Common Agricultural Policy, as, for example, the increase of French agricultural production by 40 per cent. However, he left one curious as to whether this increased production has brought about, and to what extent, increased agricultural exports from France to Germany, since I recall a French agricultural expert with the European Commission regretting that the Common Market seemed more effective in stimulating German agricultural production and efficiency, than in stimulating French exports.

Michael Akehurst has brought to us the results of his experience with the problems of translation in working with the English Translation Section of the European Communities, and discussed the canons of interpretation which ought to be used by the British courts in interpreting the Community treaties. I wish he had proceeded further with the latter subject.

J. A. Emlyn Davies has given us an interesting and penetrating analysis of the Council's directive on the registration and publication of corporate articles and

amendments, and appointment of officers and directors, including their effect on the authority of officers and directors. However, it is not much in advance of what a careful and reflective reading of the Directive by a competent solicitor would yield. What is missing is again a critique of the continental approach to corporate regulation. To an American lawyer familiar with American corporate procedures and regulation, the Council Directive would seem to be one of utter fantasy and unreality directed to false problems. So it was surprising that Davies thought that some of the requirements of this Directive had merit as compared with current British procedures. For example, publication would constitute effective notice only if advocates and notaries in France and Belgium maintain in their offices complete files of the *Journal Officiel* and the *Moniteur Belge* going back several years. Do they *really* do that in France and Belgium? And if they do, isn't it an expensive and cumbersome procedure which public registry offices make unnecessary?

Dr. Gillian White is to be complimented on having prepared a concise and comprehensive survey of the Court of Justice of the European Communities, and even this writer, who considers himself an expert in the matter, learned something new. But again, he kept wishing she had given critical and detailed attention to some of the interesting problems, such as the distinction between interpretation and application of the E.E.C. Treaty under Article 177.

Likewise, Professor B. A. Wortley's two lectures on monopolies and restrictive practices are excellent, concise surveys of the subjects, and yet I wish also he had lingered longer over some of the details. For example, it is difficult for this writer to accept as a proper interpretation of Article 86 of the E.E.C. Treaty that Continental Can in merely buying a Dutch company which would give it 70 per cent of the relevant market has by that fact 'abused' a dominant position. His view is apparently also Professor Wortley's view, although his text is not very explicit. Since the draftsmen of the E.E.C. Treaty must have used the American Sherman Anti-trust Act as a point of departure, it would seem that Article 86 was a deliberate and intentional rejection of the American view that monopolies ought to be illegal *in se*.

In view of the fact that the volume appeared under distinguished auspices at an opportune time when Britain was about to enter the Common Market, there is little doubt that this volume will find its way into nearly all library collections on European Community law, and will be extensively used by students in the next few years. Its utility for the private library, or the private practitioner is limited, and the same funds and efforts would be better used in keeping going the several specialized journals on European Community law.

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